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THE

MINING REPORTS.

A SERIES CONTAINING THE CASES ON THE

LAW OF MINES

FOUND IN THE AMERICAN AND ENGLISH REPORTS, ARRANGED ALPHABETICALLY BY SUBJECTS,

WITH NOTES AND REFERENCES.

By R. S. MORRISON,
OF THE COLORADO BAR.

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CASES REPORTED IN VOLUME XIII.

Adam v. Briggs Iron Co., 225.
Adderly v. Storm, 435.
Alden's Appeal, 139.
Amador Canal Co., Atkinson v. 428.
Armstrong v. Caldwell, 252.
Atkins v. Gamble, 514.
Atkinson v. Amador Canal Co., 428.

Backhouse v. Bonomi, 677.
Baglan Hall Colliery, *In re* 261.
Bagley, Merrimac M. Co. v. 461.
Bagnall, Williams v. 686.
Baker v. McDowell, 84.
Basshor v. Forbes, 530.
Baugh, Wheatley v. 374.
Bean v. Valle, 292.
Belmont M. Co., Winter v. 595.
Benson v. Miners' Bank, 107.
Bercich v. Marye, 544.
Bigelow, Foreman v. 263.
Bigley v. Risher, 176.
Bonomi, Backhouse v. 677.
Booth v. Pollard, 322.
Bowler v. Wolley, 65.
Bowman v. Irons, 312.
Brandon, Flint v. 308.
Braxon v. Bressler, 163.
Brayton v. New England C. M. Co., 458.
Brehen v. O'Donnell, 397.
Bressler, Braxon v. 163.
Brewster Iron Co., Marvin v. 40.
Briggs Iron Co., Adam v. 225.
Brown v. Robins, 669.
Brumagim, Hawley v. 464.
Buckley v. Howell, 245.
Bugbey, Natoma W. & M. Co. v. 211.
Byers, Parrott v. 505.
Bynum, Fitz v. 612.

Cabe v. Dixon, 357.
Caddick v. Skidmore, 383.
Caldwell, Armstrong v. 252.
Cameron v. Seaman, 584.
Carothers v. Connolly, 394.
Cartwright, Ladd v. 607.
Chadwick, Stewart v. 236.
Child v. Hugg, 512.
Child, Mayer v. 399.
Clayton, Pollard v. 334.
Coalfield Co. v. Peck, 623.
Commercial M. Co., Treasurer v. 360.
Connolly, Carothers v. 394.
Cook, Van Bokkelen v. 421.
Cowan v. Hardeman, 113.
Currier v. Lebanon Slate Co., 559.

Daney G. & S. M. Co., Heydenfeldt v. 204.

Darby, Smith v. 695.
Davidson v. Rankin, 472.
Dawes, Sharp v. 576.
Dixon, Cabe v. 357.
Dousman v. Wisconsin & L. S. Co., 572.
Dugdale v. Robertson, 662.

Ellis v. Schmoeck, 259.

Fairs, Jefferys v. 367.
Findlay v. Smith, 182.
First Nat. Bank v. Price, 485.
Fitz v. Bynum, 612.
Flint v. Brandon, 308.
Forbes, Basshor v. 530.
Foreman v. Bigelow, 269.
Franks Oil Co. v. McCleary, 477.
Freeland v. Hoffmann, 289.

Gamble, Atkins v. 514.
Garcia, Wheeler v. 481.
Gatewood v. McLaughlin, 387.
Geiger v. Green, 324.
Gibson v. Tyson, 72.
Globe Oil Co., Sheriff v. 475.
Gold Mt. M. Co., Morrison v. 578.
Green, Geiger v. 324.
Griffith, Price v. 330.
Grenfel, Rowe v. 234.
Groucott, Williams v. 632.
Guppy, Stevens v. 315.

Hacker v. National Oil Co., 538.
Haines v. Roberts, 668.
Hardeman, Cowan v. 113.
Hawkins v. Mansfield M. Co., 581.
Hawley v. Brumagim, 464.
Heydenfeldt v. Daney G. & S. M. Co., 204.
Higgins v. Houghton, 195.
Hoffmann, Freeland v. 289.
Hornbuckle, Toombs v. 430.
Houghton, Higgins v. 195.
House v. Palmer, 104.
Howell, Buckley v. 245.
Huber, Welland v. 363.
Hudson Iron Co. v. Stockbridge Co., 120.
Hudson Iron Co., Stockbridge Co. v. 120.
Hugg, Child v. 512.

Irons, Bowman v. 312.
Ivanhoe M. Co. v. Keystone Cons. M. Co., 214.

Jefferys v. Fairs, 367.
Jeffries v. Williams, 645.
Jones v. Wagner, 690.

Kelsey v. Northern Light Co., 497.
Keystone M. Co., Ivanhoe M. Co. v. 214.
Keystone M. Co., Patterson v. 169, 171.

Ladd v. Cartwright, 607.
Langdon, Pence v. 32.
Lebanon M. Co., Wolfley v. 282.
Lebanon Slate Co., Currier v. 559.
Levy, Merrimac M. Co. v. 467.
Little Chicago Lode, Mountain King Lode v. 289.
Lyon, Shoenberger v. 88.
Lyon, Strong v. 554.

Macbryde v. Weeks, 346.
Machinists' Bank, Pratt v. 590.
Maine Boys' Tunnel Co., Smith v. 460.
Mansfield M. Co., Hawkins v. 581.
Marston v. Simpson, 36.
Marvin v. Brewster Iron Co., 40.
Marye, Bercich v. 544.
Marye, Stone v. 593.
Maturin v. Tredinnick, 15.
Mayer v. Child, 399.
Meadow Valley Co., Sherwood v. 547.
Merrimac M. Co. v. Bagley, 461.
Merrimac M. Co. v. Levy, 467.
Miners' Bank, Benson v. 107.
Morrison v. Gold Mt. M. Co., 578.
Morton, Smart v. 655.
Moss, McCullough v. 440.
Mountain King Lode v. Little Chicago Lode, 289.
Munn v. Stone, 102.
McCleary, Franks Oil Co. v. 477.
McCullough v. Moss, 440.
McDowell, Baker v. 84.
McLaughlin, Gatewood v. 387.

National Oil Co., Hacker v. 538.
Natoma W. & M. Co. v. Bugbey, 211.
New England Coal Co., Brayton v. 458.
Nicklin v. Williams, 650.
North American M. Co., Smith v. 599.
Northern Light Co., Kelsey v. 497.

O'Donnell, Brehen v. 397.

Payne, Searight v. 401.
Palmer, House v. 104.
Parrott v. Byers, 505.
Partridge v. Scott, 640.
Patterson v. Keystone M. Co., 169, 171.
Peck, Coalfield Co. v. 623.
Pence v. Langdon, 32.
Perkins v. Rice, 8.
Pollard, Booth v. 322.
Pollard v. Clayton, 334.
Pratt v. Machinists' Bank, 590.
Pratt v. Taunton Mfg. Co., 590.
Price, First Nat. Bank v. 485.
Price v. Griffith, 330.
Putnam v. Smith, 68.

Rankin, Davidson v. 472.
Reese River S. M. Co., *In re* 19.
Rice, Perkins v. 8.
Risher, Bigley v. 176.
Roberts, Haines v. 668.
Robertson, Dugdale v. 662.
Robins, Brown v. 669.
Rowe v. Grenfel, 234.

San Buenaventura M. Co. v. Vassault, 550.
Schmoeck, Ellis v. 259.
Scott, Partridge v. 640.
Seal, Wynkoop v. 493.
Seaman, Cameron v. 584.
Seaman v. Vawdrey, 62.
Searight v. Payne, 401.
Sharp v. Dawes, 576.
Sheriff v. Globe Oil Co., 475.
Sherwood v. Meadow Valley Co., 547.
Shoenberger v. Lyon, 88.

Simpson, Marston v. 36.
Sims v. Smith, 161.
Skidmore, Caddick v. 383.
Smart v. Morton, 655.
Smith's Case, 19.
Smith v. Darby, 695.
Smith v. Findlay, 182.
Smith v. Maine Boys' Tunnel Co., 460.
Smith v. North American M. Co., 599.
Smith, Putnam v. 68.
Smith, Sims v. 161.
South Mt. Cons. M. Co., *In re* 615.
Stephenson v. Wilson, 408.
Stevens v. Guppy, 315.
Stewart v. Chadwick, 236.
Stewart, Wilkinson v. 1.
Stockbridge Iron Co. v. Hudson Iron Co., 120.
Stockbridge Iron Co., Hudson Iron Co. v. 120.
Stone v. Marye, 593.
Stone, Munn v. 102.
Storm, Adderly v. 435.
Strong v. Lyon, 554.

Taunton C. M. Co., Pratt v. 590.
Toombs v. Hornbuckle, 430.
Treasurer v. Commercial M. Co., 360.
Tredinnick, Maturin v. 15.
Tyson, Gibson v. 72.

Valle, Bean v. 292.
Van Bokkelen v. Cook, 421.
Vassault, San Buenaventura M. Co. v. 550.
Vawdrey, Seaman v. 62.
Vincent v. Watson, 388.

Wagner, Jones v. 690.
Watson, Vincent v. 388.
Watts v. White, 11.
Weeks, Macbryde v. 346.
Welland v. Huber, 363.
Wheatley v. Baugh, 374.
Wheeler v. Garcia, 481.
White, Watts v. 11.
Wilkinson v. Stewart, 1.
Williams v. Bagnall, 686.
Williams v. Groucott, 632.
Williams, Jeffries v. 645.
Williams, Nicklin v. 650.
Wilson, Stephenson v. 408.
Winter v. Belmont M. Co., 595.
Wisconsin & L. S. Co., Dousman v. 572.
Wolfley v. Lebanon M. Co., 282.
Wolley, Bowler v. 65.
Wynkoop v. Seal, 493.

TABLE OF CASES CITED IN VOLUME XIII.

THOSE CASES PRINTED IN ITALICS ARE TO BE FOUND REPORTED IN THE SERIES.

Aberaman Iron Works, *In re* 280.
Abernathie v. Con. Virginia Co., 631.
Abinger v. Ashton, 322, 372. 6 M. R. 1.
Acton v. Blundell, 376. WATER.
Adair v. Shaw, 279.
Adams v. Pease, 165.
Adderley v. Dixon, 340.
Adley v. Whitstable Co., 574.
Agawam Bank v. Strever, 556.
Ahrens v. Adler, 39. 12 M. R. 114.
Ah Yew v. Choate, 224. 1 M. R. 492.
Alger v. Scoville, 397.
Alison's Case, 280.
Allaway v. Wagstaff. 639.
Allen v. Dykers, 528, 556.
Allen v. Harding, 310.
Allen v. Sewall, 472, 485.
Ames v. Cannon River Co., 168
Anderson v. Kennedy, 373.
Anderson v. Mayers, 429.
Anderson v. Simpson, 406. 9 M. R. 262.
Andrews v. Murray, 488.
Anglesea Colliery Co., *In re* 264.
Anglo Cal. Bank v. Grangers' Bank, 631.
Anspach v. Bast, 542. 12 M. R. 110.
Armstrong v. Caldwell, 52.
Arnold v. Lyman, 394.
Arnold v. Stevens, 42, 252, 258. 1 M. R. 176.
Arundell v. Phipps, 362.
Ashby v. Blackwell, 592.
Ashby v. White, 653, 682.
Atkins v. Gamble, 549. 13 M. R. 514.
Attorney General v. Chambers, 168.
Attorney General v. Hanmer, 168.
Attorney General v. Life & F. Ins. Co., 450.
Attorney General v. Smith, 224.
Attwood v. Fricot, 169, 170. 2 M. R. 305.
Aughinbaugh v. Coppenheffer, 691.

Babcock v. Case, 39. 6 M. R. 618.
Backhouse v. Bonomi, 650. 13 M. R. 677.
Bahia & S. F. R'y, *In re* 592.
Bailey v. Bancker, 485.
Bailey v. Glover, 279, 426.
Bailey v. Pittsburg Co., 581.
Bainbridge v. Gehring, 181. 3 M. R. 40.
Baker v. Bank, 279.
Baker v. McDowell, 100, 112. 13 M. R. 84.
Baldwin v. Calkins, 432.
Baldwin v. Whiting, 232.
Banet v. A. & S. R. Co., 616.
Bank v. Alison, 275.

Bank v. Case, 616.
Bank v. Lanier, 592.
Bank of Poughkeepsie v. Ibbotson, 611.
Bank of Utica v. Smalley, 439.
Banta v. Savage, 401. 7 M. R. 113.
Bardwell v. Ames, 43, 229.
Bare v. Hoffman, 432.
Barge's Case, 265.
Barker v. Millard, 431.
Barlow v. Rhodes, 50.
Barnes v. Mawson, 257.
Barnes v. Sabron, 374, 382. 4 M. R. 673.
Barnes v. Ward, 636.
Baron de Beville's Case, 264.
Barreda v. Silsbee, 35.
Barrow v. Nashville Co., 405.
Barstow v. Savage Co., 544, 595, 631.
Barstow v. Union Co., 433.
Bartlett v. Harlow, 232.
Bassett v. Monte Cristo Co., 433. 4 M. R. 108.
Basshor v. Forbes, 538. 13 M. R.
Baxter v. Brown, 385.
Bayles v. Baxter, 406. TRUST.
Beach v. Fulton Bank, 366.
Bean v. Valle, 406. 13 M. R. 292.
Beard v. Converse, 292, 406. 2 M. R. 670.
Beck v. Allison, 322.
Beers v. Robinson, 394.
Belknap v. Bender, 388.
Bell v. Wilson, 42, 159. 10 M. R. 415.
Bemis v. Upham, 229.
Bend v. Susquehanna Co., 470.
Bennett's Case, 280.
Benson v. Lamb, 350.
Bentz v. Armstrong, 691.
Biddle v. Levy, 505.
Bill v. Sierra Nevada Co., 629. 7 M. R. 413.
Billings v. Taylor, 230. 5 M. R. 65.
Binks v. South Yorkshire Co., 636.
Binsse v. Wood, 482.
Birchett v. Bolling, 312.
Birmingham R'y v. Locke, 479.
Bishop v. North, 43, 139. 15 M. R. —.
Bissell v. Mich. S. R. R., 440.
Blackett v. Bates, 372.
Blackett v. Bradley, 43.
Blagden v. Bradbear, 385.
Blain v. Agar, 280. 6 M. R. 333.
Blake v. Marnell, 366.
Blakesley v. Whieldon, 372. 8 M. R. 8.
Bligh v. Brent, 385.
Blossom v. Brightman, 232.
Blunt v. Walker, 467.
Blymire v. Boistle, 391.
Blyth v. Topham, 634.
Board of Trustees v. Haven, 165.
Bohlen v. Arthurs, 7.
Bond v. Mt. Hope Co., 629. 14 M. R. —.
Boone v. Missouri Co., 372.
Booth v. Pollard, 335. 13 M. R. 322.
Booth v. Smith, 312.
Borrowman v. Rossel, 181.
Boswell v. Green, 176. 2 M. R. 362.
Bosworthen Co., *In re* 629.
Boucher v. Vanbuskirk, 328.
Boughton v. Otis, 488.
Bowker v. Goodwin, 629. 10 M. R. 149.
Bowman v. Bates, 314. 6 M. R. 363.
Bowman v. Irons, 194. 13 M. R. 312.
Bowman v. Torr, 239.
Boyce v. Greene, 406, 629.
Boylan v. Huguet, 547, 629. 14 M. R. ——.
Bradbury v. Davis, 433. 3 M. R. 403.
Brandt v. McKeever, 163. 9 M. R. 216.
Braxon v. Bressler, 7. 13 M. R. 163.
Breed v. First National Bank, 512. 1 M. R. 467.
Brewer v. Salt Association, 194.
Brewster v. Lathrop, 629. 2 M. R. 552.

Brewster v. Sime, 549, 593, 598, 629. TRUST.
Bridger v. Pierson, 46.
Bromley v. Jefferies, 329.
Bronson v. Wiman, 482.
Brookman v. Rothschild, 525.
Brown v. Ashley, 434. 12 M. R. 163.
Brown v. Chadbourne, 165.
Brown v. Corey, 691. 5 M. R. 368.
Brown v. Howard Ins. Co., 593.
Brown v. Jackson, 691.
Brown v. Morris, 406. 3 M. R. 177.
Brown v. Pinkham, 411.
Brown v. Robins, 43. 13 M. R. 669.
Bruce v. Tilson, 367.
Bruff v. Mali, 629. 6 M. R. 574.
Buccleuch v. Wakefield, 46.
Burg v. Pope, 378.
Burgner v. Humphrey, 655.
Burns v. McCabe, 39. 7 M. R. 1.
Burr v. Wilcox, 616.
Burroughs v. Satterlee, 382.
Bush v. Sullivan, 406. 9 M. R. 214.
Butler, Estate of, 424.
Butler v. Smalley, 584.
Butz v. Ihrie, 380.
Buxton v. Lister, 340, 362.
Byard v. Holmes, 39, 269. 6 M. R. 598.
Byasse v. Reese, 397.

Calcraft v. Roebuck, 62.
Caldwell v. Copeland, 44, 256, 258. 1 M. R. 189.
Caldwell v. Fulton, 253, 690. 3 M. R. 238.
Caledonian R'y v. Lord Balhaven, 664.
Caledonian R'y v. Sprot, 45, 664.
Campbell v. Lambert, 181.
Canadian Oil Co., *In re* 280.
Canal Co. v. Sansom, 471, 480.
Canedy v. Marcy, 134.
Cardigan v. Armitage, 43, 117, 137, 159.
Carling's Case, 275.
Carlisle v. Carlisle, 324.
Carlton v. Jackson, 593.
Carlyon v. Lovering, 51. TIN STREAMING.
Carothers v. Connolly, 388. 13 M. R. 394.
Carpentier v. Mitchell, 432.
Carradine v. Carradine, 88.
Carson v. Arctic M. Co., 464, 469.
Case of Mines, 64.
Cathcart v. Robinson, 308.
Causici v. La Coste, 118.
Central R'y v. Kisch, 23.
Chadwick v. Trower, 44.
Chaffin v. Cummings, 616.
Chamberlin v. Prior, 45.
Chapman v. Toy Long, 288. 1 M. R. 497.
Charless v. Rankin, 640.
Charlotte Bank v. Charlotte, 498.
Chase v. Merrimack Bank, 616.
Chater v. San F. S. R. Co., 362, 583.
Chester Glass Co. v. Dewey, 616.
Chicago Coal Co. v. Liddell, 388. 3 M. R. 126.
Cholmeley v. Paxton, 249.
Chubb v. Upton, 616.
City Bank v. Bruce, 567.
City of Chicago v. Laflin, 165.
City of London v. Nash, 310.
Clapham v. Shillito, 372. 6 M. R. 431.
Claremont v. Carleton, 165.
Clark v. Babcock, 194. 8 M. R. 599.
Clark v. Duval, 43.
Clark v. Flint, 362.
Clark v. Foot, 691.
Clark v. Monongahela Co., 541.
Clarke v. Turton, 366.
Clavering v. Clavering, 190. 14 M. R. ——.
Clegg v. Dearden, 677, 683. 5 M. R. 88.
Clegg v. Edmondson, 334. 8 M. R. 180.
Clement v. Youngman, 691. 5 M. R. 230.
Clermont *v.* Tasburgh, 350.
Clinan v. Cooke, 302, 385.
Clough v. Railway, 270.

Coates v. Sangston, 536.
Cogswell v. Bull, 507.
Coit v. Houston, 181.
Coleman v. Columbia Oil Co., 559, 629. 3 M. R. 483.
Coles v. Trecothic, 301.
Collins v. Evans, 404.
Collins v. Townsend, 39.
Colt v. Net'ervill, 362.
Colvin v. McCune, 408, 433. 1 M. R. 223.
Commercial Bank v. Kortright, 548.
Commissioners v. Withers, 165.
Commonwealth v. Alger, 165.
Commonwealth v. Bank, 279.
Commonwealth v. Bringhurst, 631.
Compo v. Jackson Iron Co., 36.
Comstock v. Johnson, 47.
Converse v. Dimock, 505.
Coonley v. Anderson, 482.
Cooper v. Denne, 62.
Cooper v. Roberts, 224.
Copper Hill Co. v. Spencer, 173, 387. 3 M. R. 267.
Cormick v. Richards, 629.
Corning v. McCullough, 472, 485, 611.
Coslake v. Till, 352.
Cottam v. Eastern Company's R'y, 592.
Cottingham v. Shrewsbury, 593.
Cowan v. Hardeman, 194. 13 M. R. 113.
Cowles v. Whitman, 362.
Cox v. Clough, 434.
Coxe v. Heisley, 691.
Coyote Co. v. Ruble, 581, 629. 4 M. R. 88.
Craig v. Wells, 46.
Crary v. Campbell, 175. 3 M. R. 270.
Crawford v. Wick, 406. 8 M. R. 541.
Creamer v. Stephenson, 537.
Crocker v. Crocker, 593.
Cross v. Kitts, 374, 382.
Crump v. U. S. M. Co., 580, 629. 3 M. R. 454.
Crutcher v. Nashville Bridge, 405.
Curling v. Flight, 372, 385.
Currie, *Ex p.* 275.
Cutler v. Tufts, 88.

Dale v. Hamilton, 385.
Dand v. Kingscote, 43, 139, 159.
Darwin v. Upton, 378.
Davis v. Henry, 372. 6 M. R. 680.
Davis v. Shepherd, 367. 6 M. R. 24.
Day v. Holmes, 629.
Dean v. Thwaite, 433. 1 M. R. 77.
DeComean v. Guild Oil Co., 629.
Deffebuck v. Hawke, 434.
Deidesheimer, Ex p. 629. 8 M. R. 41.
Demarest v. Wynkoop, 431.
Denison v. Holiday, 159.
Dennis v. Eckardt, 43.
Denny v. Lyon, 592.
Denny v. Richardson, 458.
Derrickson v. Smith, 488.
DeRuvigne's Case, 275.
DeWitt v. Morris, 7.
Dillingham v. Fisher, 414.
Dodd v. Holme, 44.
Doe v. Lock, 136, 159.
Doll v. Meador, 196.
Doloret v. Rothschild, 350, 362.
Donohoe v. Mariposa Co., 407.
Doolittle v. Tice, 411.
Douglass v. Ireland, 630. 4 M. R. 32.
Douglass v. Reynolds, 557.
Dow v. Gould & Currie Co., 421.
Droitwich Co. v. Curzon, 265.
Drummond's Case, 264.
Duncan v. Sylvester, 225.
Duncuft v. Albrecht, 362.
Dunphy v. Ryan, 407.
Dupont v. Davis, 411.
Durham & S. R'y Co. v. Walker, 136, 659.
Dutchess Cotton Co. v. Davis, 479.
Dwight v. Whitney, 691.
Dyce v. Hay, 49.
Dyer v. Sanford, 136.
Dygert v. Matthews, 136.

Eadon v. Jeffcock, 639.
Eads v. Williams, 372.
Earl of Cardigan v. Armitage, 43, 117, 137, 159.
Earl of Glasgow v. Hurlet Alum Co., 43, 691.
Earl of Lonsdale v. Littledale, 674.
East Jersey Co. v. Wright, 357. 9 M. R. 332.
East Kongsberg Co., *In re* 280.
Eastern Counties R'y v. Philipson, 181.
Ecclesiastical Com. v. N. E. R'y, 433, 677. 12 M. R. 609.
Ede v. Johnson, 630.
Edwards v. Darby, 113, 194.
Egerton v. Mathews, 304.
Elliot v. N. E. R. Co., 43.
Ellis v. Tone, 434.
Embrey v. Owen, 653, 682.
English v. Johnson, 169, 170. 12 M. R. 202.
Erie Plank Road v. Brown, 543.
Ernest v. Virian, 334. 8 M. R. 205.
Erricson v. Michigan Co., 40.
Errington v. Aynesly, 308, 311.
Esling v. Zantzinger, 391.
Essex Turnpike v. Collins, 541.
Etting v. Bank U. S., 35.
Eureka Co. v. Richmond Co., 291. 9 M. R. 578.
Evans' Case, 266.
Ewart v. Cochrane, 43.
Ewing v. Oroville Co., 630.
Ewing v. Sandoval Co., 40.

Falls v. Carpenter, 292, 373. 6 M. R. 397.
Fancy v. Scott, 159.
Farmers' Bank v. Butchers' Bank, 549.
Farmers' Bank v. Hannon, 631.
Farnham v. Hotchkiss, 44.
Farnum v. Platt, 103, 137, 160. 8 M. R. 330.
Farrand v. Marshall, 44, 691.
Farwell v. Houghton Copper Works, 550, 630.
Fatman v. Lobach, 548.
Faull v. Alaska Co., 631.
Feiling and Rimington's Case, 265.
Ferguson v. Landram, 277.
Findlay v. Smith, 245. 13 M. R. 182.
Fish v. Dodge, 43.
Fisher v. Morris Canal, 548.
Fisher v. Worrall, 372. VENDOR AND PURCHASER.
Flagstaff Co. v. Tarbet, 291. 9 M. R. 607.
Fletcher v. Green, 593.
Flint v. Brandon, 323. 13 M. R. 308.
Fobes v. Shattuck, 7.
Foley v. Harrison, 198.
Foley v. Mason, 691.
Forbes & Judd's Case, 264.
Ford v. Hopkins, 526.
Foreman v. Bigelow, 599. 13 M. R. 269.
Forster v. Hale, 385, 406.
Forsyth v. North Am. Oil Co., 481. 11 M. R. 115.
Foss v. Harbottle, 273.
Foster v. Seymour, 269.
420 M. Co. v. Bullion Co., 433. 1 M. R. 114; 11 Id. 608.
Frankford Co. v. Philadelphia R. R., 691.
French v. Carhart, 160.
French v. Spencer, 416.
Frisby v. Ballance, 372.
Frith v. Barker, 691.
Frost v. Clarson, 556.
Frost v. Walker, 616.
Frue v. Houghton, 360.
Fry v. L. & B. S. R. Co., 616.
Fulton v. Norton, 258.

Gaff v. P. & S. R. Co., 616.
Garnet M. Co. v. Sutton, 281.
Garrison v. Howe, 488, 588.
Gashwiler v. Willis, 630. 3 M. R. 516.
Gass v. Hampton, 631.
Gates v. McKee, 557.
Gatewood v. McLaughlin, 170, 173. 13 M. R. 387.
Gavit v. Chambers, 165.

Gayford v. Moffatt, 48.
Gee v. Pearse, 353.
Gelpcke v. City of Dubuque, 167.
Gerhard v. Bates, 505.
German v. Machin, 328.
Gesner v. Cairnes, 639.
Giddings v. Sears, 630.
Gifford v. Carvill, 11, 612, 630. 6 M. R. 558.
Gill v. Dickinson, 639.
Gillett v. Treganza, 7. 7 M. R. 432.
Gillon v. Boddington, 654.
Gilpin v. Howell, 496, 528.
Glamorganshire Co. v. Irwine, 629. 6 M. R. 565.
Glass v. Hulbert, 135.
Golden Fleece Co. v. Cable Co., 282, 291. 1 M. R. 120.
Golden Tel. Co. v. Commercial Tel. Co., 325.
Goller v. Fett, 387. 11 M. R. 171.
Gooch v. Sullivan, 406. 5 M. R. 14.
Goodman v. Chace, 305.
Goodrich v. Laflin, 556.
Gordom, *Ex p.* 305.
Gordon v. Gordon, 366.
Gordon v. Swan, 630. 3 M. R. 84.
Goshen Turnpike v. Hurtin, 619.
Gottschall v. Melsing, 433. 1 M. R. 667.
Gould v. G. W. D. C. Co., 48.
Gray v. Portland Bank, 574.
Graydon v. Graydon, 549.
Green v. Armstrong, 397, 398.
Green v. Morrison. 388.
Green v. Palmer, 174.
Green v. Putnam, 47.
Green Tp. v. Campbell, 433.
Greenleaf v. Francis, 378.
Grey v. Northumberland, 258. 7 M. R. 251.
Groot v. Story, 68.
Grubb's Appeal, 158, 433. 3 M. R. 416.
Grubb v. Bayard, 72. 9 M. R. 199.
Guest v. Homfray, 350.
Gwynne v. Heaton. 301.
Gyger's Estate, 207.
Haag v. Delorme, 411.
Haldeman v. Bruckhart, 382, 691. 5 M. R. 108.
Hale v. Rawson, 583.
Halsey v. McLean, 488.
Hancock v. Hodgson, 497. 11 M. R. 698.
Hardenbergh v. Bacon, 387, 523, 549, 629. 1 M. R. 352.
Harger v. McCullough, 472, 487.
Harlan v. Harlan, 6.
Harlem Canal v. Seixas, 479.
Harnett v. Yielding. 308.
Harper v. Butler, 424.
Harris v. Equator Co., 11, 433. 12 M. R. 178.
Harris v. Ryding, 42, 159, 659, 665, 689, 692.
Harris v. S. F. R. R., 549.
Harrisburg Bank v. Commonwealth, 488.
Harrison v. Heathorn, 280, 616.
Hart v. Lauman, 549.
Hartford & N. H. R. v. Boorman, 470.
Hartford & N. H. R. v. Croswell, 452.
Hartford & N. H. R. v. Kennedy, 470, 616.
Hartwell v. Camman, 236. 3 M. R. 229.
Hatch v. Dana, 616.
Hawkins v. Mansfield Co., 578. 13 M. R. 581.
Hawley v. Brumagim, 493, 523, 549. 13 M. R. 464.
Hay v. Cohoes Co., 43.
Hays v. P. & S. R. Co., 616.
Hayward v. Rogers, 631.
Haywood v. Cope, 315, 367, 372. 6 M. R. 499.
Hebron Co. v. Harvey, 382.
Henry v. Everts, 292. 5 M. R. 603.
Henry v. Risk, 691.
Hetrich v. Deachler, 381.
Hext v. Gill, 43, 159.
Hibernia Turnpike v. Henderson, 541.
Highland Turnpike v. McKean, 479.
Hightower v. Thornton, 607.

Hill v. Frazier, 490.
Hills v. Bannister, 580.
Hilton v. Lord Granville, 43.
Hilton v. Whitehead, 44.
Hind v. Holdship, 391.
Hinton v. Locke, 549.
Hirbour v. Reeding, 406. 11 M. R. 514.
Hixon v. Pixley, 630. 11 M. R. 555.
Hodges v. Buffalo, 450.
Hodgkinson v. Fletcher, 234, 258. 1 M. R. 173.
Hodgson v. Field, 48.
Hodgson v. Moulson, 662. 8 M. R. 511.
Hoeveler v. Mugele, 181. VENDOR AND PURCHASER.
Hoffman v. Ætna Ins. Co., 43.
Hoffman v. Carow, 546.
Holbrook v. N. J. Zinc Co., 595, 630.
Holmes v. Johnson, 691.
Horner v. Watson, 690. 14 M. R. 1.
Horton v. Morgan, 528, 556.
Hounsell v. Smyth, 634.
Howell v. Young, 683.
Hoy v. Sterrett, 378.
Hubbell v. Meigs, 43.
Huddersfield Co. v. Buckley, 470.
Huff v. McCauley, 406. 9 M. R. 268.
Huff v. McDonald, 433. 14 M. R. —.
Huffman v. Hummer, 364, 373. 2 M. R. 242.
Hughes v. Vermont Co., 280.
Humble v. Mitchell, 362.
Humphries v. Brogden, 43, 636, 659, 664, 680, 691, 697.
Hunt v. Rousmanire, 134.
Hunter v. Gibbons, 433.
Huntingdon Co. v. English, 630. 10 M. R. 233.
Hutchison v. Commonwealth, 1, 6. 4 M. R. 208.
Huthmacher v. Harris, 180.

International Co. v. Mills, 325.
Iron Silver Co. v. Cheeseman, 291. 9 M. R. 552.
Irwin v. Corode, 691. WASTE.
Ivanhoe Co. v Keystone Co., 195. 13 M. R. 214.
Ives v. Van Auken, 43.

Jack v. Martin, 377.
Jackson v. Tarquand, 405.
Jackson v. Feather River Co., 170, 173, 388. 5 M. R. 594.
Jackson v. Stoetzel, 253. 1 M. R. 228.
Jamaica Pond Co. v. Chandler, 137.
James v. McKerron, 366.
Jefferys v. Smith, 229, 315.
Jeffries v. Williams, 659, 674. 13 M. R. 645.
Jennings v. Broughton, 8. 12 M. R. 405.
Jennison v. Walker, 42.
Jesus College v. Bloom, 245.
Jewett v. Dringer, 1.
Johnson v. Buell, 282, 291. 9 M. R. 502.
Johnson v. Goslett, 280.
Johnston v. Renton, 592.
Jones v. Adams, 16.
Jones v. Carter, 271.
Jones v. Collins, 419.
Jones v. Soulard, 164.
Jones v. Wagner, 236, 258. 13 M. R. 690.
Jordan v. Meredith, 691.
Jupiter Co. v. Bodie Co., 282. 4 M. R. 411.

Kaler v. Beaman, 51.
Kelly v. Ruble, 407, 581.
Kennedy v. Gibson, 279.
Kent v. Quicksilver Co., 512, 599, 630. 4 M. R. 47.
Kenton Furnace v. McAlpin, 550.
Keyse v. Powell, 258.
Kidmore v. Eikenberry, 357.
Kieffer v. Imhoff, 691.
Kille v. Ege, 428. 12 M. R. 654.
Kimball v. Billings, 546.
Kimberly v. Patchin, 7.
Kindley v. Gray, 39.
King v. Thomas, 434.

King v. Wilson, 350.
Kingston v. Lesley, 380.
Kirksey v. Florida Co., 461.
Klein v. Atchison & S. R. Co., 616.
Koch v. Branch, 546.
Kritzer v. Woodson, 490.
Kyle v. Tubbs, 196.

Lacustrine Co. v. Lake Guano Co., 397.
Lake Ontario R. Co. v. Mason, 616.
Lake Vineyard v. San Gabriel, 382.
Lakin v. Sierra Buttes Co., 433.
Lasala v. Holbrook, 44.
Lawler v. Burt, 488.
Lawrence v. Ballou, 429.
Lawrenson v. Butler, 328.
Lawton v. Rivers, 50.
Leaming v. Wise, 630. 7 M. R. 41.
Leavitt v. Fisher, 548.
Lebanon M. Co. v. Rogers, 282, 434.
Le Croy v. Eastman, 527.
Leifchild's Case, 264.
Leighty v. Susquehanna Tpk., 541.
Lenfers v. Henke, 406. 5 M. R. 67.
Leonard v. Judd, 71.
Leonard v. Vredenburgh, 305
Lessieur v. Price, 193.
Lewis v. Disher, 411, 418.
Lindley v. Lacey, 537.
Lindsay v. Lynch, 322.
Livingston v. Lynch, 449.
Livingston v. Moingona Co., 690.
Lord v. Goddard, 404.
Lord Darcy v. Ashwith, 193.
Lorman v Benson, 165.
Lower Macungie v. Merkhoffer, 632.
Lowry v. Commercial Bank, 592.
Lucas v. Commerford, 308, 310.
Lunar v. Thornton, 583.
Lyddal v. Weston, 63, 159.
Lyon v. Gormley, 258. 5 M. R. 383.

Macbryde v. Weeks, 315. 13 M. R. 346.
Mackay v. West. Union Tel. Co., 631.
Madison v. Chinn, 308.
Mandeville v. Wilson, 426.
Mandlebaum v. North Am. Co., 590, 631. 5 M. R. 506.
Marcy v. Clark, 438, 472, 485.
Markham v. Jaudon. 513, 556.
Marshall v. Golden Fleece Co., 631.
Martin v. Zellerbach, 629.
Marvin v. Brewster Co., 62, 113, 258. 13 M. R. 40.
Marye v. Strouse, 630. 2 M. R. 294.
Mawson v. Fletcher, 39, 372. VENDOR AND PURCHASER.
Maxwell v. Moore, 414.
Mayger v. Cruse, 373.
Mead v. Elmore, 511.
Means v. Presbyterian Church, 112.
Mechanics' Bank v. Seton, 361.
Mechanics' Bank v. N. Y. R. R., 523, 546, 548, 580, 602.
Mellor v. Spateman, 681.
Merrimac Co. v. Bagley, 469. 13 M. R. 461.
Merrimac Co. v. Levy, 479. 13 M. R. 467.
Messersmith v. Sharon Bank, 477.
Micklethwait v. Winter, 159.
Middleton v. Pritchard, 164.
Midland R'y v. Taylor, 592.
Migotti's Case, 264.
Miller v. Ball. 406.
Miller v. Mickel, 401.
Miller v. Miller, 381.
Mills v. Hall, 55.
Milroy v. Spurr Mt. Co., 607. 12 M. R. 53.
Milward's Est., *In re* 258.
Mine Hill Co. v. Lippincott, 686. 12 M. R. 555.
Moakes v. Nicolson, 181.
Moens v. Heyworth, 404.
Mokelumne Co. v. Woodbury, 472. 12 M. R. 6.
Monroe v. Bowen, 104.
Mont Blanc Co. v. Debour, 282.
Moody v. McClelland, 640.
Moore v. Clear Lake W. Wks, 168.
Moore v. Fitz Randolph, 328.
Moore v. Metropolitan Bk., 595.
Mordue v. Durham, 159.
More v. Massini, 168. 7 M. R. 455.

Morgan v. Livingston, 165.
Morgan v. McKee, 39. 3 M. R. 128.
Morgan v. N. Y. R. R., 485.
Morgan v. Reading, 165.
Morris v. Edgington, 49.
Morrison v. Gold Mt. M. Co., 584. 13 M. R. 578.
Mortlock v. Buller, 299.
Morton v. Bartning, 434.
Morton v. Nebraska, 113, 194. 12 M. R. 451.
Mosley v. Virgin, 308, 310.
Moss v. Averell, 440.
Moss v. McCullough, 472.
Moss v. Oakley, 436, 440, 447, 455, 472, 487, 623. 12 M. R. 1.
Moss v. Rossie Co., 440. 1 M. R. 289.
Mott v. Hicks, 450.
Mudgett v. Horrell, 630.
Munn v. Stone, 137. 13 M. R. 102.
Murley v. Ennis, 406. 12 M. R. 360.
M. & T. R. Co. v. Harris, 616.
McBee v. Loftis, 159, 252, 374, 433, 677. 3 M. R. 222.
McCabe v. Burns, 32. 6 M. R. 665.
McCafferty v. Griswold, 407.
McCluskey v. Cromwell, 557.
McCormick v. Varnes, 291. 9 M. R. 505.
McCreary v. McCreary, 537.
McCullough v. Irvine, 691.
McCune M. Co. v. Adams, 506.
McIver v. Ragan, 431.
McKeon v. See, 43.
McMahon v. Burton, 159.
McNeil v. Tenth Nat. Bk., 593.

Naglee v. Pacific Wharf, 511, 598.
Natoma Co. v. Bugbey, 223. 13 M. R. 211.
Nazro v. Ins. Co., 574.
Neaves v. North St. M. Co., 407.
Nelson v. Boynton, 397.
Nelson v. O'Neal, 161. 4 M. R. 275.
Nessler v. Bigelow, 434.
Newbold v. Wright, 691.
Newell v. People, 116.
New Eng. Bank v. Newport Factory, 472.
New Jersey Zinc. Co. v. N. J. Frank. Co., 43.
Newman v. Frost, 45.
Newton v. Porter, 547.
N. Y. Life Ins. Co. v. Milnor, 50.
N. Y. R. R. v. Schuyler, 548.
Nichols' Case, 276.
Nichols v. Nichols, 414.
Nicklin v. Williams, 677, 680. 13 M. R. 650.
Nicol's Case, 18.
Nimick v. Mingo Iron Wks., 485.
Nims v. Johnson, 224.
North Georgia v. Co. Latimer, 372. 12 M. R. 367.
Norway v. Rowe, 350.
Nourse v. Prime, 526, 556.
Noyes v. Johnson, 315.

Oakes v. Turquand, 280.
Ogle v. Somerset Tpk., 541.
O'Meara v. North Am. Co., 547.
Orr Co. v. Reno Co., 631.
Otter v. Brevoort Co., 629.
Outwater v. Nelson, 549.

Packard v. Richardson, 305.
Palmer v. Ridge Co., 471, 480.
Panton v. Holland, 44, 691.
Pardee v. Murray, 289, 434.
Parker v. Boston & M. R. R., 379.
Parker v. Frith, 350, 372.
Parker v. Foote, 378.
Parker v. Nickson, 273.
Parkin v. Thorold, 350.
Partridge v. Scott, 44, 673. 13 M. R. 510.
Patterson v. Hitchcock, 286, 291. 5 M. R. 542.
Patterson v. Keystone Co., 387. 13 M. R. 171.
Paxton v. Bacon Co., 630. 3 M. R. 512.
Payne v. Elliot, 280, 629. 14 M. R. ——.
Payne v. Hook, 423.
Peabody v. Minot, 232.
Pell's Case, 264.
Penn Match Co. v. Hapgood, 578.

Penna. Co. v. Ryan, 181.
Penna. Salt Co. v. Neel, 691.
Peo. v. Canal Appraisers, 165.
Peo. v. Crockett, 195.
Peo. v. Elmore, 598.
Peo. v. Minong M. Co., 630.
Peo. ex rel. v. Morrill, 168.
Peo. v. Robinson, 435.
Perkins v. Aldrich, 65.
Perkins v. Stockwell, 104.
Perring v. Hone, 260.
Peterson v. Bank, 424.
Pettingill v. Porter, 50.
Peyton v. Mayor of London, 44, 648.
Phelan v. Hazard, 269. 12 M. R. 41.
Phila. R. R. v. Hickman, 543.
Pierrepont v. Barnard, 398.
Pinnington v. Garland, 693.
Piper v. Connelly, 163.
Pollard v. Clayton, 322. 13 M. R. 334.
Pollock v. Nat. Bank, 592.
Pomfret v. Ricroft, 47.
Pool v. Lewis, 168.
Powell v. Jessop, 280, 385.
Pratt v. Calif. M. Co., 334.
Pratt v. Taunton Copper Co., 547. 13 M. R. 590.
President, etc., v. McConahy, 541.
Pretty v. Solly, 639. 8 M. R. 301.
Prince v. Lynch, 630.
Proud v. Bates, 46. WAY.
Provost v. Calder, 46.
Puget Sound Co. v. Worthington, 407.
Pullman v. Upton, 616.
Putnam v. Sweet, 574.

Radcliff v. Brooklyn, 691.
Radcliffe v. Warrington, 328.
Railroad v. Howard, 277.
Railroad v. Schurmeir, 165.
Rapp v. Palmer, 691.
Rawlins v. Wickham, 26.
Rawlings v. Bell, 404.
Ray v. Hodge, 181. 15 M. R. —.
Rayner v. Stone, 323.
Reaves v. Ore Knob Co., 181. 3 M. R. 369.
Reed v. Spicer, 433. 4 M. R. 330.
Reg. v. Northumberland, 117.
Reich v. Rebellion Co., 581.
Rex v. Kent, 638.
Rex v. Kerrison, 638.
Reynolds v. Waring, 385.
Rhynd v. Hyndman, 481. 3 M. R. 166.
Rich v. Johnson, 234, 258. 1 M. R. 173.
Richardson v. Vermont R. R., 691.
Riche v. Railway, 277.
Richmond Co. v. Rose, 363.
Ricketts v. Unangst, 576.
Rindge v. Judson, 556.
Roberts v. Dauphin Bank, 7. 6 M. R. 54.
Roberts v. Haines, 43, 668, 674.
Roberts v. Read, 654, 683.
Robertshaw v. Bray, 372.
Robinson v. Imperial Co., 433. 10 M. R. 370.
Robinson v. Smith, 574. 8 M. R. 443.
Rockville Tpk. v. Van Ness, 510.
Rockwood v. Wilson, 691.
Rogers v. Taylor, 43.
Rokeby v. Elliot, 1. 8 M. R. 651.
Ross v. Moses, 631.
Rowbotham v. Wilson, 43, 665, 673, 683, 690, 697.
Rowe v. Brenton, 258.
Rowe v. Grenfel, 252. 13 M. R. 254.
Ruppel v. Patterson, 433.
Russell v. Clark, 404.
Russian Iron Works, *In re* 19.
Rust v. Conrad, 372.
Rutland Co. v. Ripley, 324, 372. 3 M. R. 291.

Saddler v. Lee, 382.
Salem Dam v. Ropes, 567.
Salisbury Mills v. Townsend, 592.
Sampson v. Hoddinott, 168.
Sanger v. Upton. 616.
Savage v. Ball, 630.

Sawyer v. Hoag, 278.
Schulenberg v. Harriman, 208.
Scorell v. Boxall, 398.
Scott v. Wells, 180.
Screven v. Gregorie, 50.
Seaman v. Low, 505.
Seaman v. Vawdrey, 53, 256. 13 M. R. 62.
Searight v. Payne, 404. 13 M. R. 401.
Sears v. Boston, 308.
Sears v. Brink, 305.
Senhouse v. Christian, 49.
Seton v. Slade, 350.
Settle v. Winters, 346.
Settembre v. Putnam, 363. 11 M. R. 425.
Sewall v. Boston W. Co., 592.
Sewell's Case, 265.
Seymour v. Delancey, 327.
Seymour v. Wyckoff, 526.
Shaler Q. Co. v. Bliss, 488.
Shaw v. Spencer, 546, 547, 629.
Sherman v. Barnard, 400.
Sherman v. Buick, 195, 213, 220.
Sherwood v. Meadow Valley Co., 598. 13 M. R. 547.
Shoenberger v. Lyon, 72. 13 M. R. 88.
Sierra Nev. Co. v. Sears, 630. 7 M. R. 549.
Silver v. Magruder, 616.
Silver Bow Co. v. Clark, 204.
Simonds v. Wellington, 136.
Simonson v. Spencer, 473, 611.
Simpson v. Fogo, 273.
Skillman v. Lachman, 547. 11 M. R. 381.
Sleeper v. Laconia, 163.
Sloan v. Lawrence Co., 120, 159. 5 M. R. 659.
Sloman v. Bank of England, 592.
Small v. Herkimer Co., 479.
Smart v. Jones, 407.
Smart v. Morton, 43, 665, 673, 690, 701. 13 M. R. 655.
Smiles v. Hastings, 52.
Smith's Case, 36. 13 M. R. 19.
Smith v. Adams, 377.
Smith v. Bellows, 428, 433. 12 M. R. 157.
Smith v. Benson, 225.
Smith v. Bryan, 397.
Smith v. Clarke, 366.
Smith v. Darby, 686. 13 M. R. 695.
Smith v. Idaho Q. M. Co., 7.
Smith v. Kenrick, 691. 6 M. R. 142.
Smith v. Lloyd, 44, 256.
Smith v. Martin, 648.
Smith v. Reese River Co., 498. 12 M. R. 415.
Smith v. Thackrah, 54.
Smith v. Wright, 549.
Snell's Case, 264.
Southcombe v. Bishop of Exeter, 350.
Southgate v. Stanley, 635.
Southmayd v. Russ, 472.
Southmayd v. Southmayd, 407.
South Mountain Co., In re 461. 13 M. R. 615.
South Wales R'y v. Wythes, 335.
Spargo's Case, 276.
Sparks v. Pierce, 434.
Spear v. Crawford, 479, 616.
Speed v. Nelson, 423.
Squires v. Brown, 488.
Stace's Case, 277.
Staple v. Spring, 432.
State v. Delesdenier, 119.
State v. Guerrero, 631. 9 M. R. 660.
State v. Leete, 631.
State v. Miller, 194.
State v. Parker, 113, 194.
State v. Pettineli, 435, 544, 550. 12 M. R. 513.
Stewart v. Anglo Cal. M. Co., 281.
Stimson v. Helps, 20.
Stockbridge Co. v. Cone Iron Works, 120. 6 M. R. 317.
Stoever v. Whitman, 691.
Stone v. Bumpus, 168. 4 M. R. 278.
Stone v. Chisolm, 607.
Stone v. Wood, 580.
Storer v. Freeman, 165.
Stoughton v. Leigh, 229. 5 M. R. 47.
Stowell v. Haslett, 372.
Strait v. Brown, 374, 382.
Stratford Bridge Case, 638.
Stroyan v. Knowles, 43.

Stuart v. Clark, 165.
Stultz v. Dickey, 691.
Summers v. Dickinson, 196.
Surey v. Piggot, 376.
Susquehanna Co. v. Quick, 433. 1 M. R. 201.
Sutro Tunnel Co., v. Seg. Belcher Co., 433.
Sutton v. Clarke, 654.
Sybray v. White, 634.
Sydnor v. Palmer, 408, 411, 420.

Table Mt. Co. v. Stranahan, 170, 173, 388. 9 M. R. 465.
Taft v. Brewster, 580.
Talbot v. Ford, 372. 8 M. R. 347.
Tayler v. Gt. Indian P. R'y, 592.
Taylor v. Ashton, 404.
Taylor v. Holmes, 631.
Taylor v. Miami Exp. Co., 567.
Taylor v. Neville, 340.
Taylor v. Plumer, 279.
Taylor v. Shafto, 44.
Taunton Tpk. v. Whiting, 541.
Terpenning v. Holton, 171, 407.
Terry v. Anderson, 279.
Terry v. Tubman, 279.
Thackrah v. Haas, 11, 612.
Thayer v. Allison, 39.
Thayer v. Wilmington Co., 372.
Thistle v. Frostburg Co., 253.
Thomas Co. v. Allentown Co., 662. 8 M. R. 36.
Thomas v. Bartow, 278.
Thompson v. Gregory, 136.
Thompson v. Toland, 465, 593, 598, 629, 631. 2 M. R. 77.
Thornburgh v. Savage Co., 421. 7 M. R. 667.
Thurston v. Hancock, 44.
Tilton v. Cofield, 171.
Timm v. Bear, 411.
Tognini v. Kyle, 176.
Tombstone Co. v. Way Up Co., 291.
Treasurer v. Commercial Coal Co., 631. 13 M. R. 360.
Tripp v. Riley, 7.
Trout v. McDonald, 382. 9 M. R. 32.
Troy Tpk. v. McChesney, 479, 616.
Tryon v. Whitmarsh, 404.
Tuck v. Downing, 8, 39. 7 M. R. 83.
Tunesma v. Schuttler, 623.
Turnbull v. Payson, 616.
Turner v. Reynolds, 43, 691. 12 M. R. 190.
Tyler v. Bennett, 398.
Tyler v. Houghton, 201.
Tyler v. Wilkinson, 381.
Tynan v. Walker, 431.

Union Bank v. Laird, 546.
Union Co. v. Dangberg, 168. 8 M. R. 113.
Union Co. v. Taylor, 433. 5 M. R. 323.
Upton v. Burnham, 616.
Upton v. Englehart, 271.
Upton v. Hansbrough, 280.
Upton v. Tribilcock, 278, 616.
Vallejo v. Randall, 12.
Van Hook v. Whitlock, 485.
Van Ness v. Pacard, 691.
Van Riper, *Ex p.*, 485.
Van Valkenberg v. McCloud, 198.
Varnum v. Abbot, 232.
Verona Co. v. Murtaugh, 588.
Vice v. Anson, 260. 11 M. R. 244.
Vickerie v. Buswell, 136.
Vincent v. Watson, 394. 13 M. R. 388.
Violett v. Patton, 305.
Voorhes v. Burchard, 47.
Voorhes v. Earl, 612.

Wain v. Warlters, 304.
Wakefield v. Duke of Buccleuch, 44.
Walker v. Bartlett, 281.
Walker v. Jeffreys, 352.
Walker v. Shepardson, 165.
Walker v. Tucker, 107, 464. 8 M. R. 672.
Walsham v. Staunton, 477.
Ward v. Johnson, 440.
Warren v. Leland, 398.
Warren v. Mower, 553.

Waterhouse v. Jamieson, 276.
Waterman v. Waterman, 373.
Waters v. Taylor, 324.
Watson v. Spratley, 280, 385.
Webb v. Portland Manufactory, 653.
Webster's Case, 19.
Webster v. Upton, 280.
Westcott v. Minn. Co., 631. 6 M. R. 336.
Weston v. Bear River Co., 510, 596.
Wharton v. Stoutenburgh, 373.
Wheatley v. Baugh, 691. 13 M. R. 374.
Wheatley v. Chrisman, 168. 11 M. R. 24.
Wheatley v. Westminster Co, 322. 8 M. R. 553.
Wheeler v. Garcia, 493. 13 M. R. 481.
Wheeler v. Guild, 548.
Wheeler v. West, 324.
Whitaker v. Brown, 46, 691. 5 M. R. 656.
White v. Skinner, 580.
Whitehead v. Parks, 159.
Whiting v. Hill, 8, 194. 6 M. R. 692.
Whitsett v. Kershow, 120.
Whorwood v. Simpson, 300.
Wickham v. Hawker, 46, 136.
Wilkins v. Ellett, 424.
Wilkinson v. Anglo Cal. M. Co., 281.
Wilkinson v. First Nat. Ins. Co., 432.
Wilkinson v. Lloyd, 281.
Wilkinson v. Proud, 44. 12 M. R. 261.
Williams v. Bagnall, 46, 695. 13 M. R. 686.
Williams v. Groucott, 258. 13 M. R. 632.
Williams v. Hanna, 629. WARRANTY.
Williams v. Leper, 397.
Williams v. Morrison, 7.
Williams v. Pomeroy Co., 408, 433, 677. 6 M. R. 195.
Williamson v. Berry, 180.
Wilson v. Henry, 408, 411, 417. 1 M. R. 557.
Wilson v. Little, 525.
Wilson v. United Ins. Co., 618.
Winans v. Ins. Co., 575.
Winter v. Belmont Co., 593. 13 M. R. 595.
Witby v. Cottle, 350.
Wolf v. Marsh, 433. 3 M. R. 205.
Wood v. Dummer, 278.
Wood v. Fales, 7.
Woodcock v. Bennett, 366.
Wood Hydraulic Co. v. King, 440. 3 M. R. 618.
Woodlane v. Hearn, 134.
Woodruff v. North Bloomfield Co., 434.
Worcester Tpk. v. Willard, 479.
Worrall v. Munn, 43.
Wright v. Howard, 164, 352, 376.
Wyatt v. Harrison, 44, 643, 648.
Wynkoop v. Seal, 481, 514. 13 M. R. 493.
Wyrley Canal v. Bradley, 44. 2 M. R. 89.

TABLE OF HEADINGS.

	PAGE.
Replevin (Continued)	1
Rescission	8
Reservation	40
Riparian Rights	161
Sale	169
Salines	182
School Lands	195
Severance	225
Share	259
Side Lines	282
Specific Performance	292
Springs	374
Statute of Frauds	383
Statute of Limitations	408
Stock	435
Surface	632
Surface Support	640

MINING REPORTS.

VOL. XIII.

WILKINSON, CARTER & CO. v. STEWART ET AL.

(85 Pennsylvania State, 255. Supreme Court, 1877.)

Party having right of possession may maintain replevin. Replevin lies wherever one man claims goods in the possession of another, and this, whether the claimant has ever had possession or not, and whether his property in the goods be absolute or qualified, provided he has the right of possession.

[1] **Replevin of mixed petroleum.** It is no bar to an action of replevin for crude petroleum that plaintiffs' oil has been mixed with other like oil of defendants by the wrongful act of a third party, where the quality of the petroleum remains unchanged. What the effect upon the plaintiffs' right would be if the character of the oil were essentially changed, not decided.

Error to the Court of Common Pleas of Venango County.

Replevin, by Samuel W. Stewart and Francis Merrick, against Wilkinson, Carter & Co., for 4,100 barrels of crude petroleum, valued at $9,225. In the early part of 1874 Stewart & Merrick stored about 17,000 barrels of crude petroleum in an oil tank of about 20,000 barrels capacity, called the Caledonia tank, which they purchased from Johnson & Co. In this tank there were also about 2,000 barrels of oil belonging to Johnson & Co. which plaintiffs agreed to store for them.

The defendants also owned an oil tank, the Carter tank, in the vicinity of the one above mentioned, the capacity of which was about 10,000 barrels, in which they had some 8,000 barrels of oil stored, and they allowed Johnson & Co.

[1] *Rokeby* v. *Elliot*, 8 M. R. 651; *Jewett* v. *Dringer*, 30 N. J. Eq. 291; *Hutchison* v. *Com.*, 4 M. R. 208.

the use of the 2,000 barrels of surplus tankage in their tank. Johnson & Co. had an oil refinery in the immediate neighborhood of both these tanks, and had, it appeared, a pipe connecting this refinery with the tanks. In the early part of 1876 the defendants learned that Johnson & Co., without their knowledge or consent, had drawn out of their tank all the oil therein except about 1,600 barrels, and upon demand they promised to return all the oil of defendants thus taken, and did replace about 6,000—4,100 barrels of which, it appeared from the evidence on behalf of plaintiffs, were taken from the tank of the latter by means of the pipe connection above alluded to. There was evidence, however, that in addition to the 1,900 barrels in plaintiffs' tank belonging to Johnson & Co., they had replaced 2,200 barrels, thus making the 4,100 barrels taken. There was also testimony on the part of plaintiffs that Johnson & Co., previous to the time of drawing out the 4,100 barrels, had been taking out oil of the plaintiffs and replacing it with worthless fluid, tar and benzine from their refinery; this, to show that their oil had deteriorated in quality; and they therefore contended that the 1,900 barrels already in plaintiffs' tank, and the 2,200 put there by Johnson & Co. to make good the 4,100 run into defendants' tank, should be applied to make good the quality of plaintiffs' oil. The testimony as to the quantity and quality of the oil thus transferred from the refinery is commented upon with sufficient fullness in the opinion of this court.

The plaintiffs submitted the following point, which the court affirmed:

If, without their knowledge or consent, plaintiffs' oil was taken out of their tank and mingled with defendants' oil, their title was not thereby lost, and they were entitled to have out of the common mixture a quantity equal to that taken from their tank and put into such mixture, and may maintain replevin therefor.

The defendants submitted the following point, which was refused:

If the oil of plaintiffs was taken by Johnson & Co. without right, and delivered to defendants to supply oil owed them and defendants, being ignorant of such wrongful taking by Johnson & Co., received the oil and mingled it with other

oil of their own, so that its identity was lost, plaintiffs can not recover in this action.

In their general charge the court, *inter alia*, said:

"The rights of Johnson & Co in each tank, for storage of oil, did not divest either plaintiffs or defendants of their oil. The mingling of oil for storage does not defeat the right of each owner to his portion of the common mass. Johnson & Co. had no right to take from either tank more oil than belonged to them. If they wrongfully took oil from the plaintiffs' tank, and placed it in the defendants', the right of property was not changed. If they took the oil claimed in this action without their knowledge or consent, to replace oil which they had wrongfully abstracted from the defendants' tank, so long as the oil so taken remained in that tank, though mingled with other oil of the defendants therein, the plaintiffs may maintain replevin therefor. The mixture was by no fault of the plaintiffs. [The property, as manifest from the treatment of all parties, was uninjured by the mixture and no wrong is done to any one by each taking out his proportion of the common mass.] When such property can be traced into a tank, the owner ought not to lose, nor should the party in possession, without right, be a gainer because he was not a wrongdoer in the taking and mingling it with his own. The owner has as clear a right to recover his oil as he would have had had it been placed there by his agreement with the owner of the tank for storage with other oil.

[The oil that is in question, so far as the plaintiffs and defendants are concerned, is the oil that was taken from the plaintiffs' tank to defendants' tank. It is alleged, and there is evidence which will likely induce you to believe, that there was very serious injury done to the plaintiffs by Johnson & Co. prior to this, in taking oil from them and replacing it with worthless stuff, to keep the tank full. Now, we leave it to you, under the evidence, in case you find any oil was restored at all, to say whether Johnson & Co. restored it in replacing the oil taken to satisfy the plaintiffs' claim on them. If you so find it was restored for that purpose, then the principles we have stated would apply in reference to its deduction.]

The verdict was for the plaintiffs; and after judgment the

defendants took this writ, their assignments of error being, 1 and 2, the portions of the charge in brackets; 3, the affirmance of plaintiff's point; and 4, the refusal of defendants.

DODD & LEE and NEILL & HEYWANG, for plaintiffs in error.

T. A. MORRISON and C. HEYDRICK, for defendants in error.

Mr. Justice PAXSON delivered the opinion of the court.

The first specification alleges that the court below erred in assuming in its charge to the jury that the oil in defendants' tank was uninjured by the mixture. This would have been error had any such question of fact been distinctly raised upon the trial. The learned judge says in that portion of the charge: "The property, as manifest from the treatment of all parties, was uninjured by the mixture, and no wrong is done to any one by each taking out his proportion of the common mass." This language leaves us no room to doubt that the court was under the impression, at least, that no question had been seriously made on the trial as to the quality of the oil in defendants' tank. A careful examination of the evidence leads us to the conclusion that the court was correct in this respect. The evidence of Mr. Sterritt, relied upon by the plaintiffs in error, is not essentially in conflict with this view. He says he examined the Carter tank prior to March 31, 1876, and there was three feet of liquid; one foot of sediment and two feet of what the witness supposed to be good oil. He examined the tank again after it was filled up by oil from the Caledonia tank, on the date last mentioned, and found about eleven feet of liquid, of which two feet eight inches was sediment, and the balance good oil. The amount of sediment would seem to bear more upon the question of the quantity than the quality of the oil; the sediment being deducted in estimating quantity and the superincumbent oil not being essentially affected in quality thereby. The evidence also tends strongly to show that Johnson & Co. practically exhausted the Carter tank prior to the last run from the Caledonia tank, in the latter part of March, 1876, from which it would follow that the oil in the Carter tank after said run, having been almost if not wholly

drawn from the Caledonia tank, must have been of one quality. Not only does the evidence fail to disclose any serious contention as to the quality of the oil, but the points put to the court by the defendants below make no reference to any such question. Had the oil been so mixed in defendants' tank as to change its quality in an essential degree, so that one barrel drawn out would not be the equivalent of any other barrel previously put in, it was an important fact to have shown, and would not have escaped the vigilance of counsel, either in the examination of the witnesses or the points submitted to the court. We do not think this specification is sustained.

The second specification is not free from difficulty. The learned judge at the conclusion of his charge submitted to the jury as a question of fact, whether the oil restored to the Caledonia tank by Johnson & Co. was placed there in return for the oil which it was conceded they drew out, or whether they put it back to satisfy the claim of the plaintiffs below, for the injury caused by Johnson & Co. in pumping a quantity of worthless stuff from their slop tank into the tank of plaintiffs. I find no evidence in the cause that Johnson & Co. restored any oil for any other purpose than that of replacing the oil taken out by them. There may be therefore technical error in this portion of the charge. We do not think it, however, a sufficient ground of reversal. In any proper view of the case I am unable to see how the defendants below could have been injured by this portion of the charge. The evidence on the part of the plaintiffs as to the quantity of slops pumped into their tank by Johnson & Co. had reference more especially to the quantity of the oil than to its quality, or to any injury resulting from the mixture. The effect of it was to show that with a given number of feet of fluid in the tank, a certain proportion of it was tar, benzine, sediment, etc. By deducting the sediment and the ten per cent. of tar and benzine diffused through the oil, the amount of the latter fluid could be ascertained with reasonable accuracy. It matters not, therefore, for what purpose Johnson & Co. put back oil into the Caledonia tank. All that had been drawn out by them into the Carter tank and not restored, could be followed and replevied by the plaintiffs below. That Johnson & Co. had pumped a given number of barrels of worthless stuff from

their slop tank into plaintiffs' tank, was no restoration of the oil drawn out thereof by them. Hence, what Johnson & Co. intended to do when they put back oil was of little consequence. The question of how much oil they took out, and how much they returned, was fairly submitted to the jury.

The third and fourth specifications allege error in the answers to points. It was urged that the answer to the plaintiffs' first point should at least have been qualified; that it refers only to quantity and ignores quality and every other essential element in the case. We have already said that the record fails to disclose any serious contention in regard to the quality of the oil. Under the facts of the case we do not regard either the point or the answer objectionable. The defendants' first point, which was refused, raised the question of the right of the plaintiffs to maintain replevin where the oil had been mixed without the act of the defendants. In the recent case of *Hutchison* v. *Com.*, 1 Norris, 472, the question of the effect of commingling oil in tanks and pipe lines was discussed at some length. It is not necessary to go over the ground again. It is well settled as a general principle that in Pennsylvania replevin lies wherever one man claims goods in the possession of another, and this, whether the claimant has ever had possession or not, and whether his property in the goods be absolute or qualified, provided he has the right of possession: *Harlan* v. *Harlan*, 3 Harris, 507, and cases there cited. In this case both the plaintiffs and the defendants had a large oil tank, situated near each other. Johnson & Co. had an oil refinery near said tanks, and had also the right of storage in each of them to the extent of two thousand barrels. The tank of the defendants was connected with the refinery by means of a pipe, and was used by Johnson & Co. as a supply tank. They drew out oil for the refinery and replaced it in whole or in part from time to time. Finally they connected the two tanks by a pipe, and the plaintiffs' tank being higher than the defendants' the oil would flow from the former to the latter. When Johnson & Co. drew oil from defendants' tank for their refinery they replaced it on several occasions by drawing from the plaintiffs' tank. They acquired no title to the oil thus unlawfully abstracted, nor did the defendants acquire any title by having it thus run into their

tank by Johnson & Co., to replace the oil taken out by them.

The plaintiffs had a clear right to follow and reclaim their oil by a writ of replevin, unless prevented by the fact of its mixture with other oil of the defendants. A given number of barrels of plaintiffs' oil having been unlawfully drawn out of their tank and placed in defendants' tank, they were entitled to have the same number of barrels of oil put back again. Had the character of the oil been so essentially changed by the mixture that one barrel would not be the equivalent for another barrel, the case would have presented a different question—one that we are not now required to pass upon. We are not prepared to say that the defendants are wholly without responsibility for the mixture. They allowed Johnson & Co. to use their tank as a supply or feeder for their refinery, to draw out oil at will, and replace it. This necessarily involved a mixture of the oil. The right of the owner of oil in tanks or pipe lines to take out his aliquot part was distinctly recognized in *Hutchison* v. *Com.*, *supra*. As bearing upon the same principle we may refer to *Wood* v. *Fales*, 12 Harris, 246; *Tripp* v. *Riley*, 15 Barb. 333; *Fobes* v. *Shattuck*, 22 Id. 568; *Kimberly* v. *Patchin*, 19 N. Y. 330.

The judgment is affirmed.

1. Replevin for rock taken from river bed: *Braxon* v. *Bressler*, 13 M. R.——

2. Writ of replevin for about 400 tons of iron ore, commonly called bog ore, *held*, too indefinite: *DeWitt* v. *Morris*, 13 Wend. 496.

3. Licensee can not maintain replevin against trespasser: *Gillett* v. *Treganza*, 7 M. R. 432.

4. Will not lie for fixtures, parcel of the realty: *Roberts* v. *Dauphin Bank*, 6 M. R. 54.

5. A co-tenant can not replevy timber severed by a co-tenant: *Bohlen* v. *Arthurs*, 115 U. S. 482.

6. Trespasser who has quarried stone can not replevy it from owner of quarry who has seized it: *Williams* v. *Morrison*, 28 Fed. 872.

7. Wood cut under claim of title not repleviable: *Smith* v. *Idaho Q. M. Co.*, 11 Pac. 878.

J. AND W. PERKINS v. RICE ET AL.

(Littell's Selected Cases, 218. Court of Appeals of Kentucky, 1816.)

[1] **Rescission after report of expert—Saltpetre cave—Statement of material facts defined.** Perkins sold to Rice a saltpetre cave, telling him that the nitrous earth in the cave would yield from three quarters to two pounds of saltpetre to the bushel of dirt, whereas, in fact, the cave had become greatly exhausted and was not capable of producing "anything nigh the quantity" of saltpetre represented. At the same time he informed him that he, the vendor, was not a judge of saltpetre caves, and advised him to not trust to his representations, but to get a competent person and have the cave examined, which plaintiff Rice accordingly did, and after such examination and report became the purchaser. *Held*, that notwithstanding such inspection, it by no means followed that the false statements of defendant had no effect in inducing the purchase. 2. That the assertions of defendant were of specific facts, distinguishing the case from those instances where the vendor had merely overstated the value of the premises, and amounted to a misrepresentation of that character which would authorize rescission.

A decree directing repayment of purchase money with interest until paid, is proper in a case where the contract is canceled.

Opinion of the court, by Judge OWSLEY.

This was a suit in chancery, brought by the appellees for the purpose of obtaining the rescission of a contract made for the purchase of a tract of land, including a saltpetre cave, with fixtures, implements, etc. The bill charges the appellees to have been induced to make the purchase by the appellants representing the capacity of the nitrous earth in the cave to yield a much greater quantity of saltpetre than from actual experiment it is found susceptible of.

The appellants deny the alleged misrepresentations and all fraud, and allege the appellees, in making the purchase, did not rely upon any representations made by them, but upon their own examination and inspection aided by the examination and judgment of William Jenkins, employed by them for that purpose.

The court below, on a final hearing, decreed the contract to be canceled, and the appellants to pay the amount, with

[1] See *Jennings* v. *Broughton*, 12 M. R. 405; *Tuck* v. *Downing*, 7 Id. 83; *Whiting* v. *Hill*, 6 M. R. 692.

interest, which had been advanced by the appellees under the purchase; and from this decree the appellants have appealed to this court.

In the consideration of this cause we shall assume as a proposition incontestibly established, not only by the positive evidence of witnesses, but as resulting from the circumstance of the appellants having worked the cave for a considerable time previous to the sale, that they must have known and did in fact actually know when they made the sale, the capacity of the earth to yield saltpetre; and with this knowledge it is also satisfactorily proved, not as was supposed in argument, by the deposition of Jenkins only, but by the concurrence of various others, that during the treaty for the contract the appellants represented the dirt in the cave to be capable of yielding from three fourths of a pound to two pounds of saltpetre to the bushel of dirt; and it is moreover abundantly proved, that at the time of sale the nitrous earth in the cave had become greatly exhausted, but of little value, and incapable of producing anything nigh the quantity of saltpetre represented. Were this case to be determined upon these facts alone, we apprehend there could be little doubt of the appellee's right to relief. At law it would be perfectly clear damages might be recovered for the deceit; and we can perceive no reason why, in equity also, relief should not be granted. The case is not analogous to those where relief has been refused for a false affirmation of value only, but approaches more intimately the case where a vendor falsely affirms a greater rent to be paid for the estate than is actually reserved. Whilst in the former case, as value consists in opinion, in which men frequently differ, the law will not so far regard the interest of those who have been altogether inattentive to their own concerns, as to give an action for such vague assertions; yet in the latter case, although the rent reserved in some measure regulates the value of the estate, as the sum paid is of a known and ascertained amount, for a false affirmation in that respect, an action will lie: 2 Ld. Ray. 1118; 2 Salk. 211. So in the present case, though for a general assertion as to the value of the cave, an action might not be maintainable, yet for a false affirmation as to the capacity of the dirt to yield a certain quantity of saltpetre,

though the quality of the dirt necessarily regulates the value of the cave, we suppose, according to the authorities just cited, an action would lie. But it is said as the appellees appear not to have confided altogether in those representations, and thereafter, aided by Jenkins, who seems to have been employed by them for that purpose, did inspect the cave before they made the purchase, it is contended, whatever otherwise might have been the consequence, the appellants can not be made accountable. It is true at the time the appellant John made the representations to the appellees, he informed them he was not a judge of saltpetre caves; told them not to rely upon his representations, and that if they were disposed to buy, advised them to procure some person capable of judging to examine the cave, and that they accordingly did procure Jenkins to go with them and inspect the cave. Notwithstanding, however, this was done, it by no means follows that the appellees were not imposed upon by the representations of the appellants. That they made the purchase under an impression the dirt in the cave was of vastly superior quality to what it in reality is, from the evidence in the cause there can not be a doubt. But whether that impression was produced by the representations of the appellants, or that of Jenkins who was employed by them to examine the cave, or both, is not perfectly clear. It is probable, however, from the apparent candor with which John Perkins made the statements, that they conduced, in a great degree, to confirm the appellees in the opinion that the quality of the dirt was equal to what was represented. Whether those statements had that effect, we suppose, can not, however, be very material in the present case; for, as the purchase was evidently made under the belief that the dirt was equal in quality to what the appellants asserted, and as the appellants must, from the evidence in this cause, have known the contract was closed upon that impression, fair dealing and the dictates of moral justice required they should have made a candid disclosure of the real quality of the dirt; and their having failed to do so, must subject them to all the consequences which could result from a false suggestion, if implicitly confided in by the appellees.

We are of opinion, therefore, the court below correctly decreed a cancelment of the contract. With respect to the

objections as to the details of the decree they can not prevail. As the appellants appear to have received four hundred dollars under the contract, it was strictly proper to decree that amount to be repaid with interest; and no impropriety is perceived in making the interest run until the principal is paid. The appellees must recover their costs in this court.

WATTS v. WHITE.

(13 California, 321. Supreme Court, 1859.)

[1] **Restoration before rescission—Tender not needed where offset exists.** The bill charged that plaintiff and defendant were engaged as partners in the purchase of mining claims; that defendant was the active partner; that by false representations he induced plaintiff to sell to him his interest at a greatly reduced price, and prayed a cancellation of the deed, an account, etc. Defendant demurred because there was no tender of the sum received on the sale sought to be set aside: *Held*, that as the bill also charged that profits belonging to the partnership were in the hands of defendant to an amount exceeding the sum paid to plaintiff for the claims, the bill in effect offered to restore the defendant to the condition in which he was before the contract was made.

Wrong place of trial, how remedied. District courts are courts of general jurisdiction, and the right to have a cause tried in particular counties is a personal privilege, which is waived if not claimed at the proper time and in the proper manner. If suit is brought in the wrong county the proper remedy is by motion for a change of venue, and not by demurrer.

[2] **Mining claims are real estate within** the Practice Act defining the venue in civil actions.

Extra territorial jurisdiction over mining claims. The late Superior Court of San Francisco had no jurisdiction of cases affecting real estate situate outside the city, and though it had jurisdiction to settle a mining partnership account between residents of San Francisco, it could not by its decree affect the title to a mining claim situate beyond such limits, by setting aside a sale of the claim. The Fourth District Court, taking the case by operation of law from the former court, possessed no greater powers in the case than the Superior Court.

Appeal from the Fourth District.

For case, see opinion.

[1] *Thackrah* v. *Haas*, 119 U. S. 499; *Gifford* v. *Carvill*, 6 M. R. 558.
[2] *Harris* v. *Equator Co.*, 12 M. R. 178.

The court below, first having overruled the demurrer, sent the case to a referee "to take an account of the value of the interests in certain mining claims which were sold by the plaintiff to the defendant, as mentioned in plaintiff's complaint at the time of such sale; also the excess of such value over and above the price paid by the defendant for the same mining interests; also to take and state an account of the dividends declared from such mining interests, which plaintiff was entitled to receive and collect, and which were due and unpaid to the plaintiff at the time of such sale."

Upon the coming in of the report, finding one thousand five hundred and twelve dollars and fifty-eight cents due plaintiff, and upon the hearing of the cause, the court decreed that the sale mentioned in the complaint was fraudulent, and that in consequence thereof plaintiff was entitled to recover damages as per report of referee, with two hundred and thirty dollars and fifty-six cents costs.

After motions to set aside report of referee and for new trial were overruled, defendant appealed.

S. H. DWINELLE, for appellant.

S. M. BOWMAN and S. H. GRAY, for respondent.

BALDWIN, J., delivered the opinion of the court, FIELD, J., concurring. TERRY, C. J., also concurred, except as to that portion of the opinion which overrules *Vallejo* v. *Randall*, 5 Cal. 461.

This was a bill, filed in the late Superior Court of San Francisco, to set aside a contract of sale made between plaintiff and defendant for a certain mining claim in Yuba county. The bill charges that plaintiff and defendant were engaged as partners in the purchase of mining claims; that the defendant was the active and managing partner, to whom the business was intrusted; that he became acquainted with the value of the claim, of which plaintiff was ignorant, and that defendant made false representations of the value to plaintiff, upon the faith of which the plaintiff sold to him at a price greatly below the real value. The bill further charges that

profits and moneys properly belonging to the partnership came to, and are in, the hands of defendant, to an amount exceeding the sum—some four hundred dollars—paid by defendant to the plaintiff. Bill prays cancellation of the deed to the claim, account, etc.

The defendant demurred on two grounds:

1. That there was no tender to defendant of the sum received on the sale sought to be set aside.

2. That this being an action affecting real estate, the San Francisco court had no jurisdiction.

The first point was not well taken. The general principle that a party seeking to rescind a contract must restore the other party to the condition in which he was before the contract was made, is unquestionably correct. But we understand the bill offers in effect to do this. It alleges that the defendant is indebted to the plaintiff in a greater sum than that paid by the defendant. This money, in the hands of the defendant himself, is as good security to the defendant for the sum due him as the defendant could desire. The plaintiff risks his case upon the issue of the investigation and settlement of the accounts; but, if he is right in his allegation, a court of equity would not require him to pay money to a party who owes him in order to enable him to wage his rights against his debtor.

2. Assuming, as we do, and as in principle we have held, that mining claims are real estate within the meaning of the Practice Act defining the venue of civil actions, a demurrer would not be the proper mode to take advantage of the error in bringing the case in the court of the wrong county. If this suit had been originally brought in the Fourth District court, it would not then have been a question of jurisdiction at all—though some *dicta*, probably, may be found in previous decisions to that effect. District courts are courts of general jurisdiction in all matters given them by law, wherever those matters may be locally situated, or wherever the parties may reside; but, for convenience, parties have a right to a trial of particular cases in particular counties. This is a mere privilege, which may be waived by those entitled to it. It must be claimed at the proper time and in the proper way. It is not, by our statute, matter in abatement of the writ, but a

mere privilege of trial of the suit in the given county. The party desiring a change of venue should move the court to change the place of trial, and then the court, in the proper case, has no discretion to refuse the motion. It seems to be made by the statute a matter, in such cases as this, of peremptory right. We think the court is not bound, of its own motion, to change the venue, and overrule so far the case of *Vallejo* v. *Randall*, 5 Cal. 461, if that case is to be so construed. It is, however, urged that the Superior Court of San Francisco had, by the law creating it, only jurisdiction of cases affecting real estate lying within the limits of the city. And so the act expressly declares; for this is an enabling act, creating a court which owes its whole life and powers to the statute. It has just such jurisdiction as the act gives—no more. The grant of jurisdiction of cases of real estate in the city is equivalent to an exclusion of jurisdiction over real estate situated anywhere else. This point arising on the complaint was so far fatal to it. Indeed, the fact appearing anywhere on the record would probably be fatal, for the court had no authority or power over the subject.

3. As the parties, plaintiff and defendant, resided in San Francisco, we do not see why the superior court had not jurisdiction of the settlement of this partnership account. But it could not, by its decree, affect the title to this mining claim, or any interest in it, by setting aside the sale, or affirming the title of the plaintiff to be untouched by it. Nor was it proper to decree to the plaintiff the real value of the mining claim. The fraud vitiated the sale, but it did not create another sale, or make the defendant take the property at its true value.

The objection, moreover, arose upon demurrrer, and, if well taken, the defendant had a right to insist that it should be passed on correctly before he was put to answer, or stand on his defense. The main and leading object of the bill evidently was to set aside this deed for fraud; the settlement of the partnership accounts, if not auxiliary to this purpose, was a secondary matter. The averment as to the state of the account indeed, seems to be incidentally made. We have already seen that the mining claim was beyond the jurisdiction of the court. The superior court not having jurisdiction, the Fourth District court, taking the case by operation of law from the for-

mer court, possessed no greater powers in the case than the superior court. It did not pretend to act by virtue of its original jurisdiction, but only as the successor of the superior court. These views are conclusive of the questions on the record.

As the plaintiff may amend his bill and seems to have a good cause of action in the forum below for a portion of his claim, we reverse the decree, and remand the case to be proceeded in according to the principles of this opinion.

Ordered accordingly.

MATURIN V. TREDINNICK.

(10 Law Times, N. S., 331. Before Wood, Vice Chancellor, 1864.)

Shares forfeited between sale and suit. Where, after a fraudulent sale of mining shares and after demand to rescind and suit brought to set aside the sale, the shares became forfeited, both vendor and vendee, plaintiff and defendant, having full notice of the calls, the loss will fall upon the party against whom the decree ultimately goes. There is no engagement on the part of a plaintiff to maintain such property during a suit to set aside a fraudulent sale thereof.

Rescission after sale of stock. A plaintiff seeking to set aside as fraudulent a sale of mining shares made to him by the defendant, can not have a rescission after he has sold such shares; but the sale of certain shares does not deprive him of the right of rescission as to others not sold, where the property is all of one sort.

Where a party has actual knowledge of facts such knowledge is equivalent to notice.

Upon the original hearing of this cause, which will be found fully reported, 9 L. T. Rep. N. S. 82, the case stood over to give the plaintiff time to elect whether he would have his bill dismissed without costs, or would have an inquiry, "under what circumstances the shares in the Nant-Iago mine, other than the twenty shares sold by him, were sold and disposed of by the company," and as to the following shares—twenty Buller and Bertha, twenty Carnewas, twenty South Buller and West Penstruthal sold to him as Carpenter's shares—whether they were then in his possession or power, and if not what had become of them, and under what circumstances.

The chief clerk, by his certificate of the 26th January, 1864,

found that, as to the Nant-Iago shares, by the regulations of the cost book of the company, shares on which a call was in arrear for thirty-one days, after due notice, became *ipso facto* forfeited; that a call of 10*s.* per share was made on the 25th March, 1861, at a meeting of the shareholders, of which defendant was chairman, and due notice given to the plaintiff of the call; that the latter had not paid the call, and that the 100 shares held by him were sold by public auction on the 15th August, 1862, in pursuance of a resolution passed at a general meeting of the shareholders held on that date. As to the twenty Buller and Bertha shares, a call had been made on the 11th February, 1861, the company was now in process of winding up under the direction of the court, and the plaintiff had been required by the official manager to pay the call so made. As to the twenty Carnewas shares, a call had been made on the 9th May, at a meeting at which the defendant was in the chair, and certain proceedings had been taken on non-payment by the plaintiff to effect the forfeiture of the shares. As to these, however, the question of forfeiture was, at the request of the parties, referred into court. As to the twenty South Buller, etc., shares, these were still in the possession of the plaintiff, but an order had recently been obtained for winding up that company in the Stannaries court. In reporting on the "circumstances under which" those shares had been dealt with, the chief clerk had admitted a letter, not previously on the face of the proceedings, of which the effect was as follows: It was dated the 12th March, 1861, and was from the plaintiff's solicitors to the defendant, stating that they had been instructed to file a bill against the latter to set aside the purchase of the shares as fraudulent, the plaintiff having recently discovered that the defendant, acting as agent for the sale, was in reality principal and owner of the shares, and on the further ground of misrepresentation as to value; before doing this they offered the defendant the option of returning the purchase money and receiving back the shares.

The following dates are material: In 1861 the last mentioned letter, 12th March; call on Nant-Iago shares, 25th March; call on Carnewas shares, 9th May; filing of bill, 21st May; in 1862, sale of Nant-Iago shares, 15th April. The defendant put in his answer on the 19th September, 1861, the bill was

amended on the 26th October, and answer to amended bill filed on the 31st December. The plaintiff's first affidavit was filed on the 17th November, 1862, and the cause did not come on for hearing till the 17th July, 1863.

It now came on for further consideration.

DANIEL, Q. C., and STEVENS, for the plaintiff, contended, that at the date of the letter of the 12th March, 1861, the plaintiff was in a position to perform his offer to return the shares, receiving back the price; the subsequent loss and forfeiture had arisen by the defendant's own default; from his position as chairman, he had notice of all the circumstances, and the court at the hearing had decided that he ought to have done what the letter called on him to do. Any loss must, therefore, be borne by him and not by the plaintiff.

WILLCOCK, Q. C., SIR HUGH CAIRNS, Q. C., and ROXBURGH, for the defendant, argued that the right to have a transaction of this sort undone could only arise when each party could be replaced in the position he held before the contract was entered into. As to the defendant, that could not have been done, even at the time of filing the bill, for the plaintiff had then forfeited the Nant-Iago shares; and even conceding that the matter was placed on a different footing by the letter of the 12th March, and that that letter ought to be taken into consideration, yet, even before that date the plaintiff had sold twenty of those Nant-Iago shares. Again, such a contract must be rescinded altogether; a plaintiff could not pick and choose amongst the subjects of the contract, he must approve or reprobate the whole. But, they contended, the letter of the 12th March ought not to have been introduced into the certificate, or to be taken into consideration in determining the rights of the parties. The case must rest on the bill; before that was filed the plaintiff could not perform that which alone entitled him to relief, for the Nant-Iago shares were then forfeited. The filing of the bill could not create an obligation on the part of the defendant to pay the calls; there was no notice from the plaintiff to him that the plaintiff held him liable for such calls, and if he had paid them, the plaintiff might have sold the shares, dismissed the bill, and

left him to his personal remedy to recover such payments. They cited *Nicol's Case*, 3 De G. & J. 387.

The vice chancellor, without calling for a reply, said that although the case was new in specie, relief could be given consistently with the strict principle that upon an application to rescind a contract it must be rescinded *in toto*, and upon the terms of the plaintiff's returning the property purchased. Now the plaintiff in this case had in substance, at the time of filing the bill, the shares he had purchased (with the exception he should next notice), and if the defendant had then done what this court now held he was bound to do, if he had restored the purchase money, he might have received back the shares. The exception was as to twenty of the Nant-Iago shares which the plaintiff had sold. Although it was true that the contract must be rescinded *in toto*, that a plaintiff could not pick and choose, dispose of a part of the property purchased, and apply to have the contract set aside as to the other parts, yet that was a rule which applied when the property was of several sorts, and a plaintiff had disposed of the whole of one sort. Here all that had been sold was a part of property of one sort, and the court would give a remedy as to what remained after allowing for the part which had been severed. This difficulty having been removed, the next question was, whether or not, at the time of filing the bill, all the shares but those twenty Nant-Iago were uninjured, and could have been handed over to the defendant. He thought it was so; for although, as to the Nant-Iago, they had been declared forfeited, yet the shares were never sold till the following year, and in the meantime applications had been made to the plaintiff to pay calls on the shares, so that it seemed pretty clear that, until actually sold, they must be looked upon as the plaintiff's. It was therefore unnecessary to have recourse to the letter of the 12th March, though he thought that letter ought not to be excluded from consideration, as fixing, in point of fact, the date from which notice was first given to the defendant of the intention to repudiate the contract, and at which his liability, if that intention were sustained by this court, would commence. Nor did it seem improper to refer to this letter as part of the evidence of the circumstances under which the shares had become forfeited. He thought that it

was properly admitted into the certificate of the chief clerk, as stating the reason for non-payment by the plaintiff of the calls, and therefore, secondarily, the reason of the forfeiture. There was the further objection to the defendant's contention that the case was not now being argued on exceptions to the certificate. As to the other shares, it was clear that no question could arise. Again, the case of the defendant would have been stronger if he had not been cognizant of the proceedings taken for forfeiture of the shares, but he was present at all the meetings. The plaintiff knew that he was present, and was not therefore in any way called on to give him notice of the intention not to pay calls. There was no engagement on a plaintiff to maintain property of a perishable nature during a suit of this nature. If a plaintiff, knowing that the defendant has notice of all the circumstances, relying on the justice of his cause, declines to maintain such property, he has a right to do so; the property then is at the risk of plaintiff or defendant, and will be taken with its damage by the unsuccessful party. As to the case that had been put by the defendant, that he might have paid those calls for the plaintiff and have then lost his money, that would easily have been dealt with by this court if it had arisen. The simple case was that the defendant, when called on, had refused to do that which the judgment of the court had held that he was bound to do, and as between him and the plaintiff the damage arising from that refusal ought to be borne by him.

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[1]IN RE REESE RIVER SILVER MINING CO. SMITH'S CASE.

(L. R. 2 Ch. App. 604. Court of Appeals in Chancery, 1867.)

[2] **Departure from prospectus by purchasing other mine—Rightful caution distinguished from laches.** Smith received a prospectus issued by the defendant, stating that they had agreed to purchase certain silver property in Nevada, and on the faith of it took shares on the second of August, 1865. On December 30th, he received word that this property had been found worthless by the party sent out to examine it, but that

[1] Affirmed in the House of Lords, L. R. 4 Ch. App. 810; 4 H. L. 64.

[2] *Webster's Case*, L. R. 2 Eq. 741; *In re Russian Iron Works*, L. R. 1 Ch. App. 574.

the company had determined to purchase other mining property instead, accompanied by the statement from the directors that they would shortly issue a detailed report, which report he received on January 19, 1866. The original prospectus had been issued in good faith, the directors believing the first mentioned mine to be valuable. On February 6, 1866, he filed a bill to be relieved from his shares. On May 28th, a winding up order was made, whereupon he applied to have his name removed from the list of contributories. *Held*, that he was not guilty of *laches*, as he had a right to wait for detailed information concerning the change in the projects of the company. 2. That he was entitled to have his name removed from the list of contributories, although since the filing of the bill the order for winding up had been made.

[1] **If persons make assertions of facts as to which they are ignorant,** whether such assertions are true or untrue, they become, in a civil point of view as responsible as if they had asserted that which they knew to be untrue.

Risk of loss of personal remedy against stockholders. It is an ordinary risk to the buyers of stock that some of the shareholders may have the right to have their names removed as contributories.

This was a motion, by way of appeal, from an order of the Master of the Rolls refusing to remove the name of Mr. Smith from the list of contributories of the Reese River Silver Mining Company, Limited.

The company was registered on the 5th of June, 1865, as a limited company, with a capital of £100,000 in 20,000 shares of £5 each, for the purpose of carrying on the business of mining. On the day of registration, Mr. Smith received from the promoters a prospectus stating the objects of the company, and referring to a mining property in Nevada, which the company had contracted to purchase from a Mr. Jones, as to which the prospectus contained the following statements:

"The property which this company has contracted for consists of about fifty acres of land, containing several very valuable claims, some of which are in full operation, and making large daily returns." "The proprietor, who has amassed a large fortune during the last eighteen months, by working a few of the claims upon the property agreed to be transferred to this company, has, to show his confidence in the prosperity of the company, agreed to receive the purchase money in fully paid up shares only, and to deposit them with the directors as a guarantee for the mines until returns are made enough to pay interest at the rate of £25 per cent. per annum, before which his shares are not to participate in any dividend whatever."

[1] *Stimson* v. *Helps*, 10 Pac. 290.

Mr. Smith, on the faith of this prospectus, applied for 100 shares, and paid a deposit of £100. The shares were allotted to him; he paid the further sum of £1 per share, which was required on allotment, and was registered as the holder on the 2d August, 1865.

Shortly after the allotment of the shares, Messrs. Johns and Aaris, two of the directors, were sent out as a deputation to Nevada to inspect the property contracted to be purchased, with power to enter into arrangements, if thought desirable, for the purchase of other property. On the 30th of December, 1865, Mr. Smith received notice of a call of £1 per share, to be paid on or before the 24th of January, 1866. On the same 30th of December he also received the following letter, signed by the chairman of the company:

"With the acquiescence of my brother directors I have much pleasure in submitting to you a copy of a most satisfactory letter received this day from our deputation at San Francisco, on their return from the mines at Reese river. It will be observed that we are to expect very soon an elaborate report from Messrs. Cummings, Cherry & Son, most influential mining engineers of New York, a member of which firm accompanied our deputation, of which we will also send a copy when we receive it; and on the return of our deputation to England all further information shall be as promptly afforded as possible. It is hardly necessary to say that the call, of which you receive notice, has been made on account of the necessary undertaking of the deputation."

The letter of the deputation contained this passage: "Our expectations regarding the property belonging to Mr. Jones we found correct; it was almost valueless; but as we then knew that other mines, which have a first-rate character, could be purchased at a far lower figure, this was a matter of rejoicing." The letter went on to say that they had purchased one of the best mines in the district for $36,000, and recommended the making a call to pay the purchase money.

On the 19th of January, 1866, Mr. Smith received a letter from the chairman of the company, which was in part as follows:

"After a few days we shall be able to send you a copy of the engineer's report before alluded to; also one from the dep-

utation. The engineer's is a very minute and satisfactory document. Messrs. Johns and Aaris found the property contracted for not only inferior to the representations made, but actually worthless; therefore, at the recommendation of the engineer, they purchased, at a very low figure, a most valuable mine called the Confidence Extension."

The report of the deputation was in fact sent at the same time. After referring to the frauds which had been committed by the sale of worthless or non-existent mines, and mentioning the sale by Jones to the company as one of them, the report stated as follows:

"We found the property contracted for by the company situated on the slope of a hill, where its own and all other workings had been abandoned months ago."

Mr. Smith refused to pay the call made on the 30th of December, and on the 6th of February, 1866, filed his bill against the company to be relieved from his shares, and to restrain the company from suing him at law for the call. The plaintiff deposed, and his evidence was uncontradicted, that until the 30th of December he knew nothing about a deputation having been sent out, and had no information whatever to lead him to doubt the accuracy of the statements in the prospectus respecting the mine contracted to be purchased. It did not appear that the directors, when they issued the prospectus, were aware that these statements were untrue; but it appeared from their own evidence that they had no other authority for making them than the representations of the vendor, and that they considered it necessary to send out a deputation to test their accuracy before the purchase was completed and possession taken.

On the 20th of April, 1866, Vice Chancellor Wood, on motion, granted an injunction to restrain proceedings at law for the call against the plaintiff: Law Rep., 2 Eq. 264. On the 27th a petition to wind up the company was presented, and on the 28th of May a winding up order was made. Mr. Smith applied for leave to go on with his suit, which was refused, and he then applied to have his name removed from the list of contributories, which application, on the 14th of March, 1867, was refused by the Master of the Rolls, who considered that Mr. Smith had not been guilty of improper delay, but

that the misrepresentations were not of such a nature as to entitle him to relief, and that the decision of Vice-Chancellor Wood, being made on an interlocutory application while the company was a going concern, did not decide the present question.

Mr. COTTON, Q. C., and Mr. EDDIS, for the appellant.

Mr. SELWYN, Q. C., and Mr GRAHAM HASTINGS, for the official liquidator.

Sir G. J. TURNER, L. J.

This is a motion to discharge an order of the Master of the Rolls, refusing an application to take the name of Mr. Joseph Mackrill Smith off the list of contributories, on the ground of his having been induced by misrepresentation to take shares in the company. It is very satisfactory, after the numerous cases of this description which have been before the court, to find that the law applicable to them has, to a considerable extent, undergone the consideration of the House of Lords in the case of *Central Railway* v. *Kisch*, LawRep., 2 H. L. 99, the judgment in which throws very clear light upon the principles which are to be applied to the decision of these cases. As I understand that case, if it can be shown that a material representation which is not true is contained in the prospectus, or in any document forming the foundation of the contract between the company and the shareholder, and the shareholder comes within a reasonable time, and under proper circumstances, to be released from that contract, the courts are bound to relieve him from it, and to take his name off any list of shareholders or contributories on which it may have been put. The case, I think, goes to that extent, according to the opinion which was expressed by Lord Romilly himself, "that contracts of this description between an individual and a company, so far as misrepresentation or suppression of the truth is concerned, are to be treated like contracts between any two individuals."

The question, therefore, in the present case must be, was there or was there not here a material representation which

was not true, contained in any document issued by the company, which led to Mr. Smith becoming a shareholder? I speak of a material representation so made that it must be treated as a representation made to him by the company, because, of course, in all these cases the question arises, by whom the representation was made. If a man goes into the market and buys on a representation made to him by the seller, that may be an entirely different case from one in which a man takes shares on a representation made to him by the company, and nothing that I say in the present case is intended to have any reference to a case of the former description. Now, the prospectus of this company contains this statement: "The property which this company has contracted for consists of about fifty acres of land, containing several very valuable claims, some of which are in full operation and making large daily returns." Again: "The success which has attended all the local companies, as also private individuals working the silver ores on all sides of these mines, is verified by official documents, and the proprietor (who has amassed a large fortune during the last eighteen months by working a few of the claims upon the property contracted to be transferred to this company) has, to show his confidence in the prosperity of the company, agreed to receive the purchase money in fully paid shares." Here there is a distinct representation of a purchase made by the company of fifty acres of land, containing several very valuable claims, some of which are in full operation and making large daily returns. Now, in the first place, was or was not that representation material? Nobody can doubt that any one who was thinking of taking shares in this company would be very much influenced by the consideration that the mines upon the property which the company had purchased were in full operation and making large daily returns. In the next place, was or was not that representation true? We have it from the statements made by the company themselves, as I understand those statements, that that representation was wholly untrue. The company appear to have sent out two of their directors to examine the property, and on the 17th of November, 1865, those directors wrote (I presume to the directors in England) a letter containing this statement with reference to the purchased property: "Our anticipa-

tions regarding the property belonging to Mr. Jones we found correct; it was almost valueless." After which they go on to say that as they knew there were other mines which could be purchased at a far lower figure, this was a matter for rejoicing. That letter having been sent to the plaintiff by the company on the 30th of December, 1865, we have a subsequent letter received by the plaintiff from the company on the 19th of January, 1866, which contains this statement: "The engineer's is a very minute and satisfactory document. Messrs. Johns and Aaris found the property contracted for not only inferior to the representations made, but actually worthless." And in the report of Messrs. Johns and Aaris we find this: "We found the property contracted for by the company situated on the slope of a hill where its own and all other workings had been abandoned months ago." We have therefore, in these reports, which were forwarded by the board of directors to Mr. Smith, a distinct and clear contradiction of the statement contained in the prospectus, that the mines on the property were in full operation and making large daily returns. Then the fact of the representation being made, and the materiality of that representation, and the fact that the representation was not well founded, being established, the case scarcely seems to me, after the decision of the House of Lords in the case of *Central Railway Company of Venezuela* v. *Kisch*, to admit of any doubt. The first argument urged on behalf of the official liquidator was, that the representation in the prospectus was not proved to be false; but in my opinion the report of the 19th of January, 1866, is quite sufficient ground for saying that it is proved untrue. Then it was said that the representation ought not to be considered as the foundation of the contract, inasmuch as the company was formed not merely for working the particular mines which were purchased. But it is clear that this was a representation which, whether the company was confined to this one mine or not, was a representation necessarily inducing and influencing the contract. Then it was said that the directors, when this representation was made, were as much deceived as the appellant himself, and that he ought not to be relieved, for that he must have understood the representation to have been made by the directors upon mere report. But if a company will take upon itself to assume the

authenticity of, and give credit to, the reports which are made to it, and represent as facts the matters stated in those reports, it must take the consequences. If the company had confined themselves to saying: "We have received reports from which we believe, and have reason to believe, that these mines are in full operation and are making daily large returns," it might and no doubt would have been very difficult for Mr. Smith to be relieved from the contract, but the company instead of thus referring to the information received, stated the circumstances as facts. I can not say that Mr. Smith was not entitled to believe the assertion so made by them, and I think that they can not be excused because they assumed as true the representations which had been made to them. I think that the case of *Rawlins* v. *Wickham*, 3 De G. & J. 304, referred to in the course of the argument, is decisive on that point. Mr. Selwyn, in the course of the argument, put a case of forged deeds and a representation made upon the strength of them. The answer to that point is this, that the deeds would constitute a foundation for the statement, whereas here the statement which was made was without any foundation except the representation made to the directors, which representation they took upon themselves to repeat to the public as being true.

I think that the reasons which I have stated are sufficient to dispose of the question on the substantial point, but then it is said that there has been such delay on the part of Mr. Smith, that he ought not to be relieved from the contract. Now certainly of late this court has laid very great stress on the necessity for parties coming here within a reasonable time in cases of this description, and I am not disposed to cast any doubt upon that principle. I think that parties who are in the position of shareholders in companies, if they come to this court to be relieved from their shares, on the ground of fraud practiced upon them, must come with promptitude. But how does this case stand in that respect? The plaintiff—I call him the plaintiff because he has filed a bill—had notice on the 30th of December, 1865, that the property which the company had contracted to purchase was almost valueless. But the directors, in the letter which gave this notice, said that they expected in a few days to have a very elaborate report upon the subject, and Mr. Smith received this subse-

quent report from the directors on the 19th of January, 1866. On the 6th of February he filed his bill. Now if time were to be taken as running against him from the 30th of December, 1865, he possibly might be considered to have come too late. But I think improper delay can not be imputed to him for not having filed his bill immediately after he received the letter of the 30th of December, 1865, and for this reason, that although that letter, or rather, the inclosure in that letter, stated that the property was almost valueless; it said nothing as to what the state of the property had been, and therefore it might well be, that though, when the two directors got out to the country, they found the mine was valueless, it might have been a producing, valuable mine at the time when the prospectus was issued; and I think he would not have been justified in filing his bill on the information which he had then received. It was not until the second report, which was received by him on the 19th of January, 1866, that the state of the property at the time when the purchase was made, was made apparent to him by the statement that the workings had been abandoned for months. I think, therefore that this is not a case in which time can be reckoned against Mr. Smith as from the 30th of December, 1865, but that it must be reckoned only from the 19th of January, 1866, within three weeks after which time the bill was filed. It may be right to observe that in the case of *Central Railway Co., of Venezuela* v. *Kisch*, relief was given by the House of Lords, notwithstanding there had been a delay of two months after full information that the fraud had been practiced. With all respect to the decision of the Master of the Rolls, it seems to me that this order can not be sustained, that Mr. Smith should be relieved from the contract, and his name taken off the list of contributories.

LORD CAIRNS, L. J.

I entirely agree with the Master of the Rolls in the view which he has expressed, that if the appellant in this case is on other grounds entitled to have his name taken off the list of contributories, he is not debarred from that relief by *laches*. The case, as it seems to me, must be viewed as if it were to

be decided on the 6th of February, 1866, on which day the appellant filed his bill. He received, on the 30th of December, a statement with regard to the mine in question which might well excite his surprise and dissatisfaction, but the same document in which that information was conveyed to him, informed him that an elaborate report from engineers who had accompanied the deputation to the district was soon to arrive, and that on the return of the deputation all further information should be as promptly afforded as possible. I agree with the Master of the Rolls, that if, in that state of things, he had immediately filed his bill, without waiting for the report or for the return of the deputation, he might well have been charged with precipitation. The further information so promised was communicated to him on the 19th of January, and then, as my learned brother has remarked, he heard also for the first time the further statement that not merely was this mine worthless as it stood, but that all the workings in it had been abandoned for months previous to the time when the deputation had arrived at the district. That information he received on the 19th of January, and upon the 6th of February his bill was upon the file. I desire to adhere to everything which has been said by myself and by others as to the necessity for promptitude on the part of any person who desires to repudiate a contract of this kind, but I am unable to see that the time which elapsed between the two dates that I have mentioned shows any lack of promptitude.

The question of delay, then, being out of the case, the next question is, was the representation in the prospectus which has been referred to, and which I will not read again, with regard to this mine, and the workings of it, a material representation with reference to the contract? It is very true, as has been said, that it is a representation with regard to one mine only, and not with regard to other mining speculations in which the company might be engaged, but it is a representation with regard to the only property which at the time when the prospectus was issued they had contracted for, and it is, in my opinion, held out to any one reading the prospectus as the main inducement for persons to take shares in the company. Every word that is said with regard to the mine is, to my mind, material in inducing any person to take shares in the company,

and it is, as I think, the more material because these mines were not mines in this country, where, probably, independent inquiry would be made, and inspection might take place, on the part of those who desired to become partners in the transaction, but were mines at such a distance that any person taking shares was obliged to rely on the statements made in the prospectus with regard to them. Then, were the representations untrue? That seems to me to be admitted, because I find that before the winding up of the company, when the company was being carried on as a going concern, when a call was being made, and a meeting of the company called to consider the report of the deputation, the executive of the company after conference with the deputation, were content to make the statement upon the information then obtained, that the mines were worthless, and to repeat the statement that the workings had been abandoned months before the deputation had gone to that part of the country. It seems to me that after that it is quite in vain to enter into any inquiry now, whether the deputation had more or less with their own eyes seen the state of affairs abroad. They had informed themselves sufficiently to enable them to make a representation of that to their employers, and their employers were satisfied to repeat that representation to the shareholders in the company, and from that admission as to the state of the mine, it seems to me neither the company nor the official liquidator can now withdraw. The representation in the prospectus being untrue in point of fact, it seems to me perfectly immaterial whether the directors, when they made it, believed it to be true, or did not believe it to be true. That might be material with reference to proceedings of a different kind instituted against the directors, with a view to obtain damages from them personally; but for the purpose of this investigation I think it must be taken that they repeated the statement as one, the truth of which they were content to vouch for. If they had been content to say: "We, ourselves, know nothing about the state of the mine, but we have been told it is a very valuable mine, largely worked at present;" and if they had in point of fact been so told, no person could have complained of the prospectus as calculated to mislead; but in place of repeating as hearsay what they had been told, they affirm it as a positive fact, and

apparently, according to the terms of the prospectus, as a fact within their own knowledge.

I am bound also to say, that now we have the whole statement of the directors before us, it is impossible to suppose that they had any reasonable ground for believing the statement which they made. No men of ordinary understanding, if they only had bestowed reflection upon that in which they were dealing, could have felt themselves justified in believing a statement of this kind, on the mere assertion of the person who was desirous of selling the property to Mr. Aaris.

Then we were very much pressed with this, that although what I have referred to might give a perfect equity as between Mr. Smith and the directors, or between Mr. Smith and the company, to have his name taken off the list, there had supervened or intervened the rights of creditors, and that in consequence of the rights of creditors, Mr. Smith ought to be deprived of the relief which otherwise he might have obtained. Now, I apprehend there can be no doubt that in any case where a contract is made between an individual engaged in trade and a person who advances money or goods to him, or where an individual is a member of a company which has entered into such a contract, being a company unincorporated, or a company whose shareholders are liable directly to creditors, it would be no defense for the individual to say to the creditor, in answer to his demand, "I have been induced to engage in this trade, or to take shares in this company, by the fraud and misrepresentation of third persons." That would be no answer, for this simple reason, that there is in either of the above cases a direct contract between the individual and the creditor, untainted by fraud or misrepresentation. It would be no answer to an action on one contract to say that another contract has been made, founded on fraud. There is, however, with regard to companies established under the act of 1862, no contract whatever between a creditor of the company and a shareholder in the company. The contract is between the creditor and the company. When the legislature introduced the principle of limited liability, it was absolutely necessary to give effect to that principle by setting up the company, and the company alone, as that with which creditors or third persons could contract. There is no doubt that

creditors contract with one of these limited liability companies with reference to, and possibly after consulting the list of shareholders in the company, and may be influenced considerably by the knowledge of who are shareholders in the company, and therefore I apprehend it is that the court has always held that if an individual has allowed his name to be put upon the list of shareholders by a contract which, as between him and the company, is valid, he can not be allowed to withdraw from the consequences of that contract as regards the payment of his calls by any collateral agreement limiting his liability as between himself and the company, but must, there being no other defense, be held liable to pay his full calls for the purpose of making good the demand against the company. But it is quite a different matter where the question is whether the individual ever did assent, by a contract valid in law, to have his name put on the list of shareholders. There, no doubt, a risk intervenes which creditors must take. It is one of the risks, and it ought to be known that it is one of the risks, which creditors are liable to in dealing with limited companies, that it may turn out that some person whose name has been entered as a shareholder in the list has a right to have his name taken off the list if he can prove that it has been fraudulently inserted there, and if he comes with promptitude to have the fraud redressed.

I therefore think that the fact that the interest of creditors is involved in the winding up does not alter the matter under the circumstances of a case like the present, and that the question must be disposed of as if it were to be disposed of upon the bill at the time when the bill was filed and before any winding up, in which case the plaintiff would be entitled to the relief prayed by the bill. Therefore, with great respect to the master of the rolls, I am bound to come to the conclusion that the application of Mr. Smith ought to have been acceded to, and that his name should be removed from the list.

PENCE v. LANGDON.

(99 United States, 578. Supreme Court, 1878.)

Doubtful questions should not be taken from jury. An exception to the refusal of the court to direct the jury to find a verdict in favor of the defendant, will not be sustained, if there is any room for doubt that it was the duty of the jury so to find.

Notice of rescission on Sunday—An objection that a notice of rescission was void because given on Sunday is without force, unless the result is effected by statutory provision, and the Nevada statute does not have that effect.

[1] **Rescission of contract for mining stock—Offer to return stock before suit.** A party seeking to rescind a contract for mining stock on the ground of fraud, is not bound to take the certificate of stock from the bank with which it has been deposited for him, and tender it back to the vendor before bringing suit.

Letters proving agency submitted to jury. If a court fails to construe certain letters and telegrams touching the agency of defendant, but leaves the question to the jury, the defendant can not complain if the letters clearly show his agency, and the jury so find.

Instructions on rescission issue. For instructions relating to a fraudulent sale of mining stock, and a rescission thereof, as approved on review, see opinion.

Knowledge of fraud as waiver—Burden of proof. A defendant who relies upon the neglect of the plaintiff to repudiate his fraudulent transaction, as a waiver of the fraud, has the burden of proving the plaintiff's knowledge of the fraud, and the time of its discovery.

Error to the Circuit Court of the United States for the District of Minnesota.

The facts are stated in the opinion of the court.

C. K. DAVIS, for the plaintiff in error.

WILLIAM LOCHREN, *contra.*

SWAYNE, Justice, delivered the opinion of the court.

A brief statement of the facts disclosed in the record will be sufficient for the purposes of this opinion, and a few remarks will suffice to dispose of the case.

[1] *McCabe* v. *Burns*, 6 M. R. 665.

Langdon lived in Minnesota. Pence lived in California, and was engaged in mining operations. On the 10th of December, 1874, Langdon, by a letter of that date, advised Pence that he had seen Watson, and inquired about their mining interests. He concluded by saying: "If anything can be done that will be satisfactory to all parties, let me know." Pence replied by letter of the 17th of that month. Speaking of the mine in which he and Watson were concerned, he said, amongst other things: "There is an eighth, that is, 7,500 shares, that can be bought if taken at once, at the same I paid and the same Watson paid, after looking and prospecting for five weeks." "The price is * * * $8,368.75, gold." * * * "Should you conclude to buy, you must telegraph me here on receipt of this letter. You can pay," etc. "This will put you on the ground floor with us, or better than I am, as I have spent about $600 to find this mine, prospect it, and have title looked up, etc. Our title is O. K." Langdon bought and paid the price demanded. On the 28th of January 1875, Pence addressed Langdon another letter from San Francisco, in which he said: "There have been not less than ½ doz. after the 7,500 *shares of stock I sold you*, and all were astonished to find themselves too late; and still more astonished when I told them there was no more to be had at present, as we have the controlling interest, and propose to run the mine as we think best." * * * "The stock I have deposited in the Nat. Gold Bank and Trust Co., of this city." * * * "I would like to have you come out after the roads get good, and weather pleasant in the spring." This letter inclosed a bill commencing, "Hon. R. B. Langdon, Minna., to J. W. Pence, dr." The stock was charged and the amount paid was credited. No person other than Pence was named as the seller. Linton and Shepherd were interested with Langdon in the purchase. On the 20th of June, 1875, all of them visited the mine with Pence. They claimed then to have learned for the first time that Pence had sold them his own stock, and to have learned also that the stock was worth much less than they had paid for it. They arrived on Saturday, and on the next day notified Pence that they rescinded the contract, and required what they had paid to be refunded. Shepherd and Linton transferred their interest to Langdon and he thereupon

brought this suit. The code of Minnesota authorized it to be in his name.

Upon the trial in the court below six exceptions were taken by Pence. Two of them were to the admission of testimony. Both of them are so clearly without merit, that we deem it unnecessary to say more about them. He also excepted to the refusal of the court to direct the jury to find a verdict in his favor.

Such direction can be properly given only when the state of the evidence is such as to leave no room for doubt that it is the duty of the jury to find accordingly. This case was certainly not within that category.

The objection that the notice of rescission was void because given on Sunday is without force. It was given at the mine, which is in Nevada. The result claimed could be produced only by a statutory provision to that effect. The statute of Nevada relating to the Sabbath in no wise affects the subject. See "An act for the better observance of the Lord's day," of November 1, 1861, 1 Compiled Laws of Nevada, p. 2, c. 3.

The stock certificate left at the Gold Bank for Langdon was never in his possession. The affirmance of this judgment will extinguish his claim to it, and Pence can reclaim it whenever he may choose to do so. Langdon was not bound to receive it and tender it back to Pence before bringing suit.

The remaining exceptions relate to instructions given to the jury, which are as follows:

"1. In deciding this question of fact, you must take the letters and telegrams, and all of them, and looking at them in the light of the previous relations of the parties, and of what each of the writers knew, placing yourselves in the writers' place and situation in order better to ascertain their meaning and purpose, and in the light shed upon this question of fact by these letters and telegrams, and by the history of the whole transaction, you must determine whether the defendant did undertake to act as the plaintiff's agent for the purchase of the stock from others."

Admitting that the court was wrong in not giving a construction to the letters one way or the other, touching the main point in the controversy, as is insisted, a concession, perhaps, not necessary to be made, it can not avail the plaintiff in

error that it was not done. Properly construed, we think the letters show clearly the agency of Pence as claimed by Langdon. The jury found accordingly. No harm was, therefore, done by the omission of the court; and if it were erroneous, the error is one of which Pence certainly has no right to complain. With respect to the duty of the court as to construing the letters, see *Etting* v. *Bank of U. S.*, 11 Wheat. 59; *Barreda* v. *Silsbee*, 21 How. 146.

"2. It was not enough to charge the plaintiff with knowledge of the mal-character of the transaction, that the language used was such as might have caused some persons to suspect it. He might, in view of previous friendly relations, have no suspicion of bad faith, and might naturally regard expressions as inaccurately used, rather than put upon them a construction which would show bad faith on the part of the defendant, which he had no reason to anticipate."

This, under the circumstances, we think was exactly right.

"3. Before the plaintiff was required to affirm or rescind the contract, he must be shown to have had actual knowledge of the imposition practiced upon him. It is not enough to show that he might have known or suspected it from data within his reach."

The preceding remark is applicable also to this instruction.

"4. If the jury believe that the plaintiff had no actual knowledge or belief that defendant had put his own stock upon them, until June, 1875, at the mine, then his repudiation of the transaction, if made then, was sufficient."

There can be no doubt as to the soundness of this proposition.

Acquiescence and waiver are always questions of fact. There can be neither without knowledge. The terms import this foundation for such action. One can not waive or acquiesce in a wrong while ignorant that it has been committed. Current suspicion and rumor are not enough. There must be knowledge of facts which will enable the party to take effectual action. Nothing short of this will do. But he may not willfully shut his eyes to what he might readily and ought to have known. When fully advised, he must decide and act with reasonable dispatch. He can not rest until the rights of third persons are involved and the situation of the wrong-doer is

materially changed. Under such circumstances he loses the right to rescind, and must seek compensation in damages. But the wrong-doer can not make extreme vigilance and promptitude conditions of rescission. It does not lie in his mouth to complain of delay unaccompanied by acts of ownership, and by which he has not been affected. The election to rescind or not to rescind, once made, is final and conclusive.

The burden of proving knowledge of the fraud and the time of its discovery rests upon the defendant.

Here Langdon was lulled into security by his relations to Pence, and by Pence's letters.

There is no proof that he had the slightest knowledge or even suspicion of any foul play until he visited the mine. His action then was prompt and decided.

The instructions of the court as to the law upon the subject were clear, accurate, and well expressed. The rest was for the jury. With what they did we have nothing to do.

We find no error in the record.

Judgment affirmed.

MARSTON ET AL. V. SIMPSON ET AL.

(54 California, 189. Supreme Court, 1880.)

[1] **Delay in offering to rescind.** A party having sold certain lands for shares of mining stock, and afterward attempting to rescind on the ground of fraud in the representations concerning the value of the stock, should offer to rescind promptly upon discovering the facts; but a delay of a little less than six months in making the offer is not such *laches* as to deprive the party of his right to relief.

[2] **Notice of fraud perpetrated by a "friend."** For certain purposes the law will presume a person to have notice of facts in respect of which he has been put upon inquiry, but if there are special reasons why one party should place trust and confidence in another, the law will not impose on him the necessity of absolutely ignoring the persistent asseverations of his "friend and neighbor" by whom he has in fact been defrauded, even though third parties may have told him that he had been "*sold*."

Appeal from a judgment for the plaintiffs, and from an order denying a new trial, in the Third District Court, County of Alameda. MCKEE, J.

[1] *Compo* v. *Jackson Iron Co.*, 12 N. W. 901.
[2] *Smith's case*, 13 M. R. 19.

The facts are stated in the opinion.

C. A. TUTTLE, for appellants.

J. P. PHELAN, for respondents.

Department No. 1, McKINSTRY, P. J.

The plaintiffs, having tendered a return of the three hundred and fifty shares of the stock of a mining corporation, which constituted the consideration for the sale of the lands, prayed for a decree rescinding the agreement for sale and purchase, and that defendants be compelled to reconvey the legal title.

It is urged by appellants that plaintiffs did not tender a return of the stock, or give notice of their intention to rescind the agreement, within a reasonable time after they discovered that a fraud had been practiced upon them.

It was doubtless the duty of plaintiffs to rescind promptly, "upon discovering the facts" which entitled them to rescind: Civ. Code, § 1691.

The court below found that on the 6th day of June, 1876, the plaintiffs caused to be served on defendants a notice in writing, to the effect that they proposed to rescind said sale and conveyance on the ground of fraud, and tendered to said defendants the shares of stock, etc.

The court also found that the plaintiffs had no knowledge of the market and selling value of the stock, until within six months prior to the commencement of this action, which was begun on the 7th of June, 1876. The fraud complained of consisted of misrepresentations by the agent of defendants, to the effect that the stock was of the value of $10 per share, when in truth, as alleged, it was worthless. The finding that plaintiffs had no knowledge of the value, implies and includes a finding that they had no knowledge that the representations of defendants' agent were false; and we can not say, as matter of law, that a delay to offer to rescind for a period of a little less than six months was such *laches* as must deprive the plaintiffs of their right to relief.

It is said, however, that the finding that plaintiffs had no

knowledge of the value until within six months is not sustained by the evidence.

Appellants' counsel has arrayed in his brief, in consecutive order, the statements of witnesses which tend to show that plaintiffs did in fact have knowledge of the real value, and that he representations of the agent were false, at an earlier date than was found by the court below.

"The plaintiff Marston says, in his testimony, 'I never ascertained this stock had any value, or anybody else. I *soon* found that no one had ever asked more than five dollars per share, and that is all I know about it. After I became the owner of the stock it was very natural, and I did, after some reasonable time, make inquiries to see what the stock was worth, but I could not find anybody who said the stock was worth anything; made inquiries there in the office from such men as I saw that knew something about it; think I talked with the Hardys about it; that might have been a week after the sale. * * * A good many people said things to me which created a distrust in my mind. It was what everybody said, if they said anything. Murray told me as soon as I got it, "you are *sold*." He said, "I have been all through that country, and I would not give you four bits for your ten dollars a share." This was the very next day after I got the stock.' Plaintiff's son says he ascertained the stock had no value about a week after the trade, and told his father."

It is undoubtedly true, that for certain purposes the law will presume a person to have notice of facts in respect of which he has been put upon inquiry.

But where, as in this case, there are special reasons why one party should and as a reasonable man, might, place trust and confidence in another, the law will not impose on him the necessity of absolutely ignoring the persistent asseverations of his "friend and neighbor." (Finding 2.) In other words, in determining whether the plaintiff, Jothan Marston, was guilty of neglect in not sooner ascertaining that the stock was of no value, the court below properly considered the representations themselves, coming as they did from one to whom he had a right to give his confidence, and required that the evidence to overcome the reliance he placed on the statements of his friend and neighbor, should be greater than such as would

excite suspicion in one who had been dealing with a stranger. The court found as a fact, that, until the period mentioned, the plaintiffs continued to rely upon the statements of Gregory, and to believe them true. We can not say that Jothan Marston ought not to have relied upon Gregory's statements up to the date when he ceased to regard them trustworthy, nor that he was bound to reject them as false before the accumulated evidence was such as brought home to his mind the conviction of their falsity, notwithstanding his struggle to retain his faith in one with respect to whom he had occupied such familiar relations.

Judgment and order affirmed.

ROSS, J. and MCKEE, J., concurred.

1. Rescission attempted after defective title confirmed by purchaser from the legal holder: *Kindley* v. *Gray*, 6 Ired. Eq. 445.

2. Vendors allowed to rescind because purchasers persisted in objections to the title to the minerals under the land: *Mawson* v. *Fletcher*, 15 M. R. —.

3. Election between rescission and action for damages; forms of complaint: *Ahrens* v. *Adler*, 12 M. R. 114; *Byard* v. *Holmes*, 6 M. R., 598, 657.

4. Necessity of tender before suit for rescission: *Babcock* v. *Case*, 6 M. R. 618; *Burns* v. *McCabe*, 7 M. R. 1.

5. Time within which rescission may be made: *Morgan* v. *McKee*, 3 M. R. 128.

6. Where stock is sold upon fraudulent representations and notes given for purchase money, vendee can not await suit on the notes, but must tender and rescind within a reasonable time after the discovery of the fraud: *Collins* v. *Townsend*, 58 Cal. 608. (THURSTON, J., dissents.)

7. Where rescission is sought upon ground of false representations the representations must relate to material matters: *Tuck* v. *Downing*, 7 M. R. 83.

8. Contract allowing vendee to rescind at his option after testing land for coal: *Thayer* v. *Allison*, 109 Ill. 180.

MARVIN v. THE BREWSTER IRON MINING CO.

(55 New York, 538; 14 Amer. Rep. 322. Court of Appeals, 1874.)

Reservation equivalent to grant. A reserve of minerals is construed as an actual grant thereof.

[1] **Right of mine owner to penetrate surface.** The reservation in a deed of land of the minerals which may be found therein, implies the right to penetrate the surface for minerals, and to use such means in mining and removing the minerals as are necessary to a profitable working of the property; but the means used must be necessary as distinguished from convenient.

The miner in his surface user may keep pace with the progress of invention so far as is necessary for profitable working in competition with rivals.

[2] **Relation between mine and surface—What the mine owner may do.** In an action by the surface owner against the mine owner to restrain certain mining operations, and to recover damages for alleged injuries to the surface: *Held*, that defendant's right to maintain a certain tramway, to erect on the surface and use a barn, powder house and blacksmith shop, to sink a shaft or drive a horizontal way, to erect and use an engine below the surface, to blast in the mine in the night time, or at any time, so as to shake or injure the plaintiff's dwelling and disturb his enjoyment, to deposit ore or refuse on the surface, was to be tested by the necessity therefor, as incidental to the right to mine and remove.

Non-user of mine—Adverse possession. The non-user of a mine reserved in a deed of land will not, of itself, extinguish the right of the mine owner. The surface owner, to effect an adverse possession, must do some act hostile to the rights of the mine owner.

Subsequent deeds ignoring reservation. The fact that deeds to subsequent grantees of the surface do not contain the reservations of the right to minerals contained in prior grants, does not affect the right of the mine owner to the minerals, or the mode of procuring them.

Storing ore. Ordinarily, the mine owner can not justify the use of the surface for the lengthened keeping of his ore, the long continued deposit of the rubbish from the mine, or the erection of buildings for the storage of materials, the housing of animals or the use of artisans.

Support of soil and buildings. All that can be claimed by the owner of the surface, under the right of subjacent support, is that no physical injury be wrought to the surface in its natural state, or as contemplated at the time of the grant. The mine owner is not bound to support buildings subsequently erected.

A mine owner can not be restrained from blasting in the night time, as is usual in the mines, although it disturbs the sleep and thus affects the health of the owner of the surface and his family, or diminishes the value of his estate.

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[1] *Ewing* v. *Sandoval Co.*, 110 Ill. 290.

[2] Strict construction in such cases; remedy of surface owner: *Errieson* v. *Michigan Co.*, 50 Mich. 604.

Action by Aaron B. Marvin against the Brewster Iron Mining Company to restrain defendant from carrying on its mining operation in plaintiff's lands situate in southeast Putnam county, and to recover damages for injuries alleged to have been occasioned thereby. The justice found the following facts: Frederick Parks, in December, 1837, conveyed the lands in question to William Downs, the deed containing a reservation in the words, "Reserving always all mineral ores now thereon, now known or that may hereafter be known, with the privilege of going to and from all beds of ore that may be hereafter worked on the most convenient route to and from." In October, 1838, Downs conveyed the land to Gilbert Bailey by deed containing the clause, "Reserving always, however, all minerals in or on said premises." The title to the lands came into plaintiff's hands August 11, 1849, through several mesne conveyances, each containing the last named reservation.

In October, 1855, Parks conveyed to one Payntar the mineral rights reserved, and the same rights were conveyed to defendant on January 15, 1858. From December, 1837, until January, 1864, there was no attempt to exercise the right of mining on the lands in question; but in the last named month and year the defendant commenced mining operations and the removal of ore, and has continued to do so. In the prosecution of these operations defendant caused the surface of the land to subside and fall in at certain places; it has deposited ore and rubbish from the mines upon plaintiff's premises, keeping such rubbish there for several years at a time, and such ore several months at a time; has erected and maintained a blacksmith shop, powder-house, and stable for horses and mules, all for the purposes of the business. Defendant has carried on blasting with powder day and night, by which plaintiff's dwelling house and reservoir were shaken and injured and the sleep and rest of plaintiff and his family have been disturbed at night by the noise of blasting. Defendant has sunk a steam engine which has been used for the purposes of the mine, and the smoke and cinders from which came up through the shaft and were driven against plaintiff's dwelling house, rendering the occupation thereof uncomfortable. Defendant has also erected a tramway several feet above the ground in front of

and upon plaintiff's premises, and upon it conveyed coal, ore and refuse stuff.

The mine had been worked previous to 1837, and several excavations had been made, a portion of which the surface owner filled up in 1837 and 1838. Plaintiff had made improvements and filled up cuts or drifts which had not theretofore been filled. The justice found as conclusions of law that defendant owned the minerals and ores in plaintiff's land; that there had been no adverse possession nor any abandonment by non-user; that defendant had a right to enter upon plaintiff's premises and dig through the surface to procure the ore in the place and manner in which this was done; that defendant had a right to maintain a tramway at the place where it was built, but had no right to elevate it unless so high as to allow plaintiff's horses and carriages to pass under it. He also found that defendant had no right to deposit or keep upon the land of plaintiff ore or refuse stuff, or any barn, stable, blacksmith shop, powder-house or other building; that defendant had no right to blast in the night during the hours devoted to sleep by plaintiff and family, or so to blast, night or day, as to shake, crack or injure plaintiff's dwelling house or other structures; that defendant had the right to use and sink a steam engine but not in the manner in which the one used was operated by defendant; and that defendant had no right to so work the mine as to deprive plaintiff's premises of the necessary support to prevent the surface falling in.

Damages were assessed at $10,580.78; and other relief was granted in accordance with the above findings. Both parties appealed to the general term, where the judgment was affirmed, but the amount of damages was reduced. Both parties appealed to this court.

C. FROST, for the plaintiff.—The right of access through plaintiff's premises to the mine is barred by adverse possession: *Arnold* v. *Stevens*, 24 Pick. 113; *Jennison* v. *Walker*, 11 Gray, 423; *Harris* v. *Ryding*, 5 M. & W. 65; *Bell* v. *Wilson*, L. R., 1 Ch. App. 303.

If the rights claimed by defendant had been inserted in the reservation in plaintiff's deed, they would have been held repugnant to the grant and void: Shep. Touch. 79, 89, 100;

Hilton v. *Ld. Granville*, 5 Q. B. 701; *Humphries* v. *Brogden*, 12 Id. 745, 754; *Blackett* v. *Bradley*, 1 B. & S. 940; *Harris* v. *Ryding*, 5 M. & W. 60; *Smart* v. *Morton*, 5 El. & B. 30. Defendant had no right to injure plaintiff's buildings because not erected within twenty years: *Stroyan* v. *Knowles*, 6 H. & N. 454; *Brown* v. *Robins*, 4 Id. 186; *Humphries* v. *Brogden*, 12 Q. B. 745, 754; *Hay* v. *Cohoes Co.*, 2 N.Y. 159. Defendant had no right to blast in the night during the usual hours of sleep, so as to disturb plaintiff and his family: *Dennis* v. *Eckardt*, Am. L. Reg., N. S. (2d Ro. 3,) p. 166; *Fish* v. *Dodge*, 4 Den. 311; *McKeon* v. *See*, 4 Robt. 449. Defendant had no right to deposit ore or refuse upon plaintiff's land, or to cause any erections to be made thereon: *Earl of Glasgow* v. *Hurlet Alum Co.*, 3 H. of L. Cas. 25, 47; Shep. Touch. 100; *Ives* v. *Van Auken*, 34 Barb. 566; *Hoffman* v. *Ætna Ins. Co.*, 32 N. Y. 405; *N. J. Zinc Co.* v. *N. J. Franklinite Co.*, 2 Beas. (N. J.), 322; *Dand* v. *Kingscote*, 6 M. & W. 173; *Bishop* v. *North*, 11 Id. 418; *Rogers* v. *Taylor*, 1 H. & N. 706; *Earl of Cardigan* v. *Armitage*, 2 B. & C. 197; *Bell* v. *Wilson*, *supra*; *Humphries* v. *Brogden*, 12 Q. B. 754; *Rowbotham* v. *Wilson*, 6 El. & B. 593; *Roberts* v. *Haines*, Id. 643; *Harris* v. *Ryding*, 5 M. & W. 69, 70; *Hext* v. *Gill*, L. R. 7 Ch. App. 700, 718. Plaintiff was entitled to damages to the time of trial: *Worrall* v. *Munn*, 38 N. Y. 137. Plaintiff was entitled to damages sustained by defendant's blasting under his house in the night time: *Hubbell* v. *Meigs*, 50 N. Y. 480.

JNO. E. PARSONS, for the defendant.—Defendant is entitled to do all that is necessary toward the convenient working of its mines, taking reasonable care to avoid injury to the property and rights of others: Collier on Mines, 58; Shep. Touch. 100; *Dand* v. *Kingscote*, 6 M. & W. 174; *Ewart* v. *Cochrane*, 4 Macq. H. of L. 117; *Earl of Cardigan* v. *Armitage*, *K. B.* (2 B. & C.) 197; *Rogers* v. *Taylor*, 1 H. & N. 706; *Elliot* v. *N. E. R. Co.*, 10 H. of L. 333; *Turner* v. *Reynolds*, 23 Pa. St. 199; *Bardwell* v. *Ames*, 22 Pick. 333; *Clark* v. *Duval*, 15 Cal. 85, 88. Because the reservation with the right to the minerals expressed also the privilege of going to and from the mine, other privileges were

not excluded: *Dand* v. *Kingscote*, 6 M. & W. 174; *Wyrley Canal* v. *Bradley*, 7 East, 368 (K. B. 1806). Plaintiff can not, by erections upon the surface of the land, enlarge defendant's obligation: *Hilton* v. *Whitehead*, 12 Ad. & El. (N. S.) 734; *Smart* v. *Morton*, 30 E. L. & Eq. 385; *Brown* v. *Robins*, 4 H. & N. 186; *Taylor* v. *Shafto*, 8 B. & S. 228; *Wakefield* v. *Duke of Buccleuch*, 4 L. R. Eq. 613; *Cal. R. Co.* v. *Sprot*, 2 Macq. H. of L. 449; *Thurston* v. *Hancock*, 12 Mass. 220; approved, *Panton* v. *Holland*, 17 Johns. 92; *Lasala* v. *Holbrook*, 4 Paige, 169, 172; *Farrand* v. *Marshall*, 21 Barb. 409. A person who puts an additional burden upon his own land is not entitled to adjacent support: 2 Rolle's Abr., Trespass, pl. 1; *Wyatt* v. *Harrison*, 3 B. & Ad. 871; *Peyton* v. *Mayor of London*, 9 B. & C. 725; *Dodd* v. *Holme*, 1 Ad. & El. 493; *Partridge* v. *Scott*, 3 M. & W. 220; *Chadwick* v. *Trower*, 6 Bing. N. C. 1. No title to such property as mines can be claimed by prescription: Rolle's Abr., Prescription (B); *Wilkinson* v. *Proud*, 11 M. & W. 33; *Caldwell* v. *Copeland*, 37 Pa. St. 427; *Smith* v. *Lloyd*, 9 Ex. 562.

FOLGER, J.

The ultimate principles upon which the decision of this case should rest are not undetermined nor obscure. The relative rights and duties of owners of superjacent lands and of subjacent minerals, have been much discussed and passed upon. Then, too, the position of adjacent owners of land is an analogous one, and the rules which have been laid down as to them, and often enforced, throw light upon the questions arising here. But at last it will be found that in this action the findings of fact of the trial court, as is often the case, control in the main the decision of the appellate court.

Of important results in this case are the rules, that this court is bound to take the facts as they are stated in the case to have been found by the judge or referee, and to compare the judgment with those statements of fact: *Farnham* v. *Hotchkiss*, 2 Keyes 9; that, in the absence of express findings of fact to sustain the judgment, it may look into the tes-

timony, and if there be evidence which will support the conclusions of law, it may infer that there was a finding of fact by the judge or referee, though not expressed: *Newman* v. *Frost*, 52 N. Y. 422; but that if there is any evidence upon which the judgment may rest, this court may not look into the testimony to determine whether there is preponderating evidence to the contrary; nor, where there is any contrariety of testimony, to determine whether it was correct to refuse to find a fact as requested: *Chamberlin* v. *Prior*, 2 Keyes, 539.

The whole estate was at first in Parks. He severed it by his conveyance to Downs. He transferred to Downs and his grantees only the surface land. It is said that such a transfer is of the surface, and of all profit which can be got from cultivating it, or building upon it, or using it; that thus much is intended to be conveyed: *Hext* v. *Gill*, Law Rep. (7 Ch. App.) 700. But as in the same conveyance there is a reserve to the grantor of an important part of the general estate, and of important incidents thereto, it is manifest that if the reserve is effectual and still operative, there is imposed upon the estate conveyed a serious servitude; that it, in its turn, becomes to a certain extent dominant over the estate reserved. The remark in *Hext* v. *Gill*, *supra*, has a limit then, and that which Parks can be reasonably considered to have granted, is the surface land, and such measure of support subjacent as was necessary for the surface land in its condition at the time of the grant, or in the state for the purpose of putting it into which the grant was made: *Cal. R. W. Co.* v. *Sprot*, 2 Macq. Scotch App. Cases (H. of L.), 451. The plaintiff, then, as the grantee by *mesne* conveyances from Downs, is the owner of the surface, with all these rights of use and profit of it, subject to such limitations as result from the servitude which his estate is under.

There is a clause in the deed from Parks to Downs, "Reserving always all mineral ores, now known or that may be hereafter known, with the privilege of going to and from all beds of ore that may be hereafter worked, on the most convenient route to and from." The learned justice has found that this is a reservation of all ore on the premises. It is also of a privilege of way upon the premises. There need be no difficulty, whether what is claimed to have been retained in

Parks by this clause is technically the subject of an exception, or of a reservation, or in part of one and in part of the other: *Craig* v. *Wells*, 11 N. Y. 315. There is no doubt of the intention of the parties to the conveyance. It was to keep in Parks and his future assigns, unconveyed to Downs and his assigns, all that which the meaning of the clause, had it been framed with strictest technicality, would have saved from the operation of the granting part of the deed: *Provost* v. *Calder*, 2 Wend. 517; *Bridger* v. *Pierson*, 45 N. Y. 601; *Whitaker* v. *Brown*, 46 Penn. St. 197.

A reserve of minerals and mining rights is construed as is an actual grant thereof. It differs not, whether the right to mine is by an exception from a deed of the surface, or by a grant of the mine by the owner of the whole estate, therein reserving to himself the surface: Shep. Touch. 100; *Dand* v. *Kingscote*, 6 M. & W. 174; *Williams* v. *Bagnall*, 15 Week. R. 272; see *Wickham* v. *Hawker*, 7 M. & W. 78; and comment thereon in *Proud* v. *Bates*, 34 L. J. (Chanc.) 406; S. C., 5 Am. Law Reg. (N. S), 171–174. A reservation of minerals and mining rights from a grant of the estate, followed by a grant to another of all that which was first reserved, vests in the second grantee, an estate as broad as if the entire estate had first been granted to him, with a reservation of the surface: *Arnold* v. *Stevens*, 24 Pick. 106. Though a reservation is to be construed most strictly against the grantor, still there will be retained in him all that it was the clear meaning and intention of the parties to reserve from the conveyance: *Harris* v. *Ryding*, 5 M. & W. 60; per PARKE, B., p. 70. These observations are made necessary by positions taken and urged on the argument by the learned counsel for the plaintiff. And here is a fit place to notice that *Hilton* v. *Ld. Granville*, 5 Q. B. (48 E. C. L. R.) 701, much relied upon by him, in that it held that there can not be reserved in a grant that which will deprive the grantee of the enjoyment of the whole thing granted, and that a clause to that effect must be rejected as absurd and repugnant, has in that respect been from time to time much questioned, and finally in effect overruled: *Rowbotham* v. *Wilson*, 8 H. of L. Cases, 348; *Duke of B.* v. *Wakefield*, L. Rep. (4 H. of L.) 377; and see *Hext* v. *Gill*, *supra*, 700–716.

The deed from Parks to Payntar, and that from Payntar to the defendant, vest in it, then, all the estate which Parks did not convey to Downs, and all the rights incident thereto; and this estate and these rights are as great as if he had made his deed to Payntar in the terms of the reservation in that to Downs, while he (Parks) owned the whole estate unsevered.

It is an old rule that when anything is granted, all the means of attaining it and all the fruits and effects of it are also granted: Shep. Touch. 89, 100; Bacon Ab., Grants (I), 4. This rule we have in more than one instance, of late, been called upon to apply in behalf of the grantee. In *Comstock* v. *Johnson*, 46 N. Y. 615, it is stated so largely as this: "Everything necessary for the full and free enjoyment of the mill passed as an incident appurtenant to the land conveyed." See also *Voorhees* v. *Burchard*, decided Nov. Term, 1873; 55 N. Y. 98. These were cases of mill sites conveyed; for the enjoyment whereof there was necessary an easement over and upon intervening lands of the grantors. A grant of minerals *in situ*, reserving the surface, is not different. It is like, too, the grant of a close, within other lands of the grantor; or of an upper story of a house, the grantor still owning the lower. There the grantee has a right of way to his close, or to his upper story, through the premises of the grantor: *Pomfret* v. *Ricroft*, 1 Williams' Saunders, 321, note 6. It is the same if the owner grants the surrounding lands and reserves to himself the close: Id. Hence a grant of minerals in the land gives a right to mine for them, unless there is a positive restriction in the grant itself.

The plaintiff claims that this general power, if thus acquired as an incident to a grant, is limited by an especial power or privilege, particularly mentioned in the grant or reservation, and as the reservation here does, in particular terms, stipulate for a privilege of going to and fro, he insists that this privilege is all that the defendant has. Such is not the effect of such a particular: *Earl Cardigan* v. *Armitage*, 2 B. & C. 197; *Green* v. *Putnam*, 8 Cush. 21. The right to work a mine, reserved by the grantor of the surface, carries with it the right to penetrate to the minerals through the surface of the land conveyed, for the purpose of digging them

out and removing them": *Gould* v. *G. W. D. C. Co.*, 29 J. P. 820; S. C., 12 L. T. 842; 13 Id. 109; *Rogers* v. *Taylor*, 1 H. & N. 706; *Hext* v. *Gill*, *supra*. This being so, there must be included in the right to break through the surface, the right to do so in such manner as is most advantageous to the owner of the right to mine, so that the surface is not wholly destroyed. By this is meant that he has the right to sink a shaft vertically, or to drive a way horizontally, or to do both in different places, so that he may reach the minerals and take them out from below the superjacent earth, following the veins of ore with excavations below the surface; always, however, under the restriction that what he does it is necessary for him to do for the reasonable use and enjoyment of his property in the minerals. We are aware that in *Harris* v. *Ryding*, *supra*, Lord ABINGER, C. B., is reported as saying to the effect that a reservation of mines and minerals gave no right to sink shafts or drive cuts upon the surface of the land from which the reservation was made. He is the only judge who there made such utterance. It was not upon a point involved in the case; it was made argumentatively. It is opposed to the general rule to be derived from other decisions. That case turned wholly upon the point, in which all the judges agreed, that miners were bound to leave reasonable support for the surface. True, BAYLEY, J., in *Cardigan* v. *Armitage*, *supra*, says the incidental power "would allow no *use* of the surface." It is plain from the current of his reasoning that he meant use of the surface as surface, in its unbroken state; for he was then reasoning toward the conclusion which he finally reached, that a reservation of coals below the surface reserved also as an incidental right the power of reaching them through the same surface; and in the same case, HOLROYD, J., suggesting to counsel, *arguendo*, said: "If the coal itself had been excepted, without more, that would have given a right of entry forever." And see *Hodgson* v. *Field*, 7 East, 613.

The necessity which is to govern is not fixed and unvarying. The right may be exercised in a manner suitable to the business to be carried on. Such is the principle of the decision in the analogous case of *Gayford* v. *Moffatt*, Law Rep., 4 Ch. App. 133, where it is held that a lessee of an inner close

becomes entitled to a right of way through an outer close, and that the way afforded to him must be suitable to the business to be carried on by him on the premises demised. And what is perhaps but an expansion of the last proposition, the exercise of the right is not to be confined to the modes in vogue when it was first acquired. The owner of the mine may keep pace with the progress of invention and ingenuity, so far as is necessary to a profitable working of his property in competition with rivals. Hence, he may adopt new and improved methods, which are usually availed of in the same business, when the use of them is necessary to him. This rule is drawn from the decision in *Dand* v. *Kingscote*, *supra*, where it was held that, under a right to a sufficient way-leave, ancient in origin, the coal owner was not confined to such ways as were in use at the time of the grant; and that under a liberty to sink pits, of like early origin, the right of erecting a steam engine and other machinery for draining the pits, with all proper accessories, passed as incidental thereto. The right there adjudicated upon, it is true, arose from the express terms of the reservation; but if the right originally exists, it is conceived that it matters not whether it is from the express terms of the instrument, or as an incident to a general power reserved, and that in the one case as well as the other it may be exercised after modern methods. And see *Dyce* v. *Hay*, 1 Macq. (H. of L. Cases), 305–312; *Senhouse* v. *Christian*, 1 T. R. 560.

It is to be borne in mind all the while that the rights which follow ownership as incident thereto are no more nor greater than those which are necessary for the beneficial enjoyment of the property. It may be convenient to have other rights, less difficult or less expensive, with them, to carry on the operations, but this is not the test. The learned counsel for the defendant insists that the measure of the use which it may make of the plaintiff's land is not the most rigid necessity, but a reasonable convenience. It is said by Lord MANSFIELD, in *Morris* v. *Edgington*, 3 Taunton, *31, "It would not be a great stretch to call that a necessary way, without which the most *convenient and reasonable* mode of enjoying the premises could not be had." We do not think that this is sustained to that extent by later decisions; and see comments upon that

case in *Barlow* v. *Rhodes*, 1 Cromp. & Meeson, 439. In *Lawton* v. *Rivers*, 2 McCord, 445, it is remarked: "An inconvenience may be so great as to amount to that kind of necessity which the law requires." In *Pettingill* v. *Porter*, 8 Allen, 1, it is held, "that there is a way by necessity, where another can not be got or made without unreasonable labor and expense; and that in determining the question, the jury may consider the comparative value of the land and the probable cost of such ways, and that the word necessary can not be limited to absolute physical necessity." But yet the way must be necessary, and the facts of each case must determine whether it or any other easement thus claimed is necessary. It must be more than one of mere convenience (*Screven* v. *Gregorie*, 8 Rich. 158), or one beneficial and convenient (8 Allen, *supra*), and is only commensurate with the existence of the necessity upon which the implied grant of it is founded, and ceases when the necessity for it ceases: *N. Y. Life Ins. & T. Co.* v. *Milnor*, 1 Barb. (Ch.) 353.

The defendant may not claim, as incident to the grant to it, that which is convenient. It may have only that which is necessary, but may have that in a convenient way. One may have a way by necessity over the land of another, and having it thus, he may have it at a place and route which is convenient for him. But he never can have it because it is convenient for him unless it is first necessary. The right arises from the necessity of the case, and not otherwise. It will be seen, when we come to consider the findings of fact and refusals, that this is of much importance. It is very rarely, then, that a case arises where, upon this test, the mine owner can justify the use of the surface for the lengthened keeping of his ore; still more rarely, for the long continued deposit of the rubbish from the mine, or for the erection of buildings for the storage of materials, the housing of animals or the use of artisans. So says BAYLEY, J., in 2 Barnewall & Cresswell, *supra*: "The incidental power would warrant nothing beyond what was strictly necessary for the convenient working of the coals. It would allow no use of the surface; no deposit upon it to a greater extent or for a longer duration than should be necessary; no attendance upon the land of unnecessary persons. It would be questionable, at least, whether it would

authorize a deposit upon the land for the purposes of sale, and whether it would justify the introduction of purchasers to view the coals." See *Kaler* v. *Beaman*, 49 Maine, 207. *Turner* v. *Reynolds*, 23 Penn. St. 199, cited by the defendant, seems adverse to this. But the language of the opinion is to be read in connection with the lease there, which was of the land as well as of the mine. It must be seldom that after the ore is separated and haled that out, there exists a necessity for the use of the land in which it is found. It, and the rubbish found with it, may ordinarily be carried from the land onto the other possession of the owner of the mineral. It is ordinarily practicable for the owner to obtain possession of land near enough for storage and dumping ground, and for sites for all buildings requisite for the purposes above named. It is seldom that considerations of vital economy create the necessity which the law recognizes. "Reasonable profit," in the phrase of PARKE, B., in *Dand* v. *Kingscote*, *supra*, is all that the mine owner can insist is within the beneficial enjoyment of his property. The defendant cites *Rogers* v. *Taylor*, 1 H. & N. 706, which does, indeed, go further than this, and does sustain the heaping up of rubbish upon the surface lands. That, however, was a decision upon demurrer, where a plea was held good which set up a like user of over twenty years, and the court held that the right was not unreasonable, and might have originated in grant—in express grant, we understand to be meant—to do the very kind of act complained of. See *Carlyon* v. *Lovering*, 40 Eng. Law and Eq. 448. These authorities are not applicable here.

We have considered the case so far, upon the incidental powers arising from the reservation of the right of property in the minerals. The privilege further reserved in the deed to Downs, and subsequently granted to defendant, of going to and from all beds of ore that might be thereafter worked, on the most convenient route to and from, we have shown does not in any wise limit these incidental powers. On the contrary, it is plain that it aids them. It is not a right of way only over the surface; it is to all beds of ore thereafter worked. Of necessity, to reach beds below the surface, the way must go through the surface; not merely on a necessary or a convenient route, but, as the terms of the privilege are, on the

most convenient route; hence by shaft, or tunnel, or both, as shall give the readiest or the cheapest access, and also across the surface to the mouth of the tunnel or shaft.

The plaintiff insists, however, that whatever may have been the rights which were retained by Parks from his conveyance to Downs, they were intercepted, and extinguished or transferred, and did not reach the defendant. He sets up an adverse possession. He bases it upon the affirmative acts of Downs and his grantees, and upon the neglects and omissions of Parks and his grantees of the minerals. This claim of an adverse possession can not rest merely upon a non-user by the grantors of the defendant. The rights now claimed by them were the subject of an express grant. In such case, though there be a non-user, if there has been no act of the owners of the surface lands which prevented the exercise of the rights of mining, they still exist: *Smiles* v. *Hastings*, 24 Barb. 44; *Armstrong* v. *Caldwell*, 53 Penn. St. 284; and see *Smith* v. *Lloyd*, 9 Exch. 562. Nor can it rest upon any act of the owners of the surface which appears in the case. To work such effect, the act must be hostile and adverse to the rights of the owner of the minerals. That can not be predicated of the acts displayed in the findings or in the proof. Not an instance is given of any assumption of control over the ore by digging it, or by preventing, interfering with or forbidding an attempt to dig it. The only acts shown are those of Downs and others, in filling up at times, and in places, the old cut to the vein, in changing in places the course of the old cart-way, and putting fences across with bars and openings therein. These were not accompanied with any claim of sole and exclusive right to the entire estate, nor to the way over it. They were not done in avowed hostility and resistance of a claim of right by the grantors of defendant. They were not acts which were of themselves, of necessity and natural result, hostile to other rights and exclusive of them. All that can be said of them is, that the owners of the surface lands had the use and enjoyment of them, and of the ways over them, but after such sort as was entirely consistent with the existence of a right of the owners of the minerals to use and enjoy them, and "of way" to them. In fine, there is nothing shown but the suspension on the one side of the exercise

of the right to mine, and on the other of acts, during such suspension, entirely consistent with the existence of such right, though suspended in its use. And this applies to all other rights reserved, as well as to the ownership of the minerals and the right to mine for them. For a discussion of this topic, so full as to forestall further elaboration here, see *Arnold* v. *Stevens*, *supra*.

There is one fact in this case not considered there, and which is urged by the plaintiff. The deeds from Downs and his grantees, down to that to the plaintiff, do not contain the clause of reservation which is in the deed from Parks to Downs. Such omission does not affect the conclusion we arrive at, as is held in *Seaman* v. *Vawdrey*, 16 Vesey, 390.

The plaintiff acquired, as a right of property, that there should be left of the minerals, in their place under the land, sufficient to support the surface in its natural state. This was the extent of his right to subjacent support, there being no buildings upon the land when Parks conveyed to Downs, nor the erection of any, one of the purposes in their contemplation: *Cal. R. W. Co.* v. *Sprot*, *supra*. The defendant lays stress upon the small consideration given for the land. The right to support is without regard to the comparative value of the strata: *Humphries* v. *Brogden*, 12 Q. B. 739. This right to sufficient subjacent support is likened, sometimes, to that to have lateral support to land. In that case, all which can be claimed is, that the adjacent owner shall not so dig upon his land as that that of his neighbor shall fall into his pit. If the weight of buildings, of late erected by his neighbor on his land, causes it to slide, when of its own weight it would not, there is no claim for redress: *Lasala* v. *Holbrook*, 4 Paige, 169. Is it not the same rule, that whatever an adjacent owner can do upon or in his own land, confined within that, and necessary for the convenient and beneficial enjoyment of it, which works no physical injury to his neighbor's possession in its natural state, he may do without liability to his neighbor, although it may work physical injury to a building lately erected thereon by his neighbor? For in *Humphries* v. *Brogden*, *supra*, the reason is given, that an owner can not, by putting an additional weight upon his own land, and so increasing the lateral pressure upon his neighbor's land, render unlawful

any operation thereon which before would have caused no damage. Is this exemption from liability confined to a case of lateral pressure? If he may so dig as that the building shall topple down, and not be liable so long as that but for the building, the earth would not have fallen in, may he not so blast in digging as that the building shall shake, crack and crumble, without giving cause of action, so long as that the surface of his neighbor's ground is not injured or disturbed, though it be shaken? He is not bound to support the building so long as he affords a support sufficient for the soil without the building. He is not bound to refrain from digging in his own land, so soon as he comes near the limit of support for his neighbor's building, not an ancient one. He is not bound to be circumspect in his means of digging, so long as they do not affect badly his neighbor's land. Is he bound to refrain from the use of the means which do not injure his neighbor's land, for that they badly affect a modern house thereon? In our judgment he is not. See *Smith* v. *Thackerah*, Law Rep. (1 C. P.), 564. Whatever it is necessary for him to do for the profitable and beneficial enjoyment of his own possession, and which he may do with no ill effect to the adjacent surface in its natural state, that he may do though it harm erections lately put thereon. As the rights and relations of adjacent owners and those of superjacent and subjacent owners are alike, so may the subjacent owner do beneath the surface what the adjacent owner may do beside it. And where, as in *Harris* v. *Ryding*, *supra*, learned judges speak of the subjacent owner not being entitled to let down the surface or injure the enjoyment of it, they mean the surface in its natural state, and not with additions to it in buildings not ancient. And see *Partridge* v. *Scott*, 3 M. & W. 220.

Nor do these rights (for a time and to a degree to impair the surface, and so that support be left sufficient for it in its natural state, to leave it insufficient to support buildings not ancient) require, or depend upon, a covenant to make compensation, as is urged by the plaintiff. It is true that many reservations of such rights are accompanied with a covenant to compensate. The covenant does not create or add to the reservation. The privileges are created, fixed and defined, by the terms of the reservation alone. If there be a reservation

without a covenant, the rights it creates or retains are just as valid and maintainable.

Nor does this case fall, in its main aspects at least, within the rule recognized and applied in *Hay* v. *Cohoes Co.*, 2 N. Y. 159. There the adjacent owner, though following a lawful purpose upon his own land, in excavating a canal thereon, cast rocks from it upon his neighbor's land. He immediately and physically invaded his neighbor's exclusive possession. He had the right to dig the canal. His neighbor had the right of undisturbed possession of his property. It was held, on grounds of public policy, better, if these rights conflicted, that he should give up the right of a particular use, than that his neighbor should lose the beneficial use of his altogether. Here, however, the case, if not reversed, is nearly so. The sole use which the defendant can make of its property is to excavate and remove it. If it is doing only what is necessary to that end, shall it give up altogether the sole beneficial use of its property, that the plaintiff may use his undisturbedly in one way, the most profitable, doubtless, and the most desirable, but still one way of several?

And so of the argument brought by the plaintiff, from the analogy of those decisions which hold that one may not so use his property as to make a nuisance to his neighbor. There can be no rightful complaint thereof by one who has agreed that such use may be made. The reciprocal rights and obligations of these parties, in this regard, come down from the contract between Parks and Downs, to which they are privies. Parks reserved the right to himself and to the defendant to do all things necessary to get at and get out this mineral; and Downs, for himself and for this plaintiff, in consideration of the sale and conveyance of the surface of this estate at the price bargained for, agreed that all necessary things might be done. One may not establish a right to make a public or a private nuisance by prescription, which is the presumption of a grant: *Mills* v. *Hall*, 9 Wend. 315. But where there has been an express grant of a right to do all things necessary to attain an end, and such nuisance results as a necessary incident thereto, there can be no claim for private damage from the doing thereof.

The point made by the plaintiff on his printed brief, that it

was but the limited right of certain persons to mine, which was reserved by Parks, is not sustained by the proofs. The folios to which he refers have been stricken out of the appeal book; it seems by stipulation.

The plaintiff also invokes the doctrine of estoppel, and insists that the defendant, having reposed upon its rights, if any it had, until the plaintiff had changed his condition by large expenditures upon his property, may not now, with good faith toward him, insist upon those rights to his detriment. There is no estoppel in the case. It does not appear that the silence or inaction of the defendant misled the plaintiff, or that he at all relied thereupon in his making his primary investment in the premises, or his subsequent expenditure in their improvement.

Having thus given our views of the legal questions involved in the case, it remains to determine the result of their application to the facts. The plaintiff appeals from so much of the judgments below (upon the questions other than his damages), as are based upon the conclusions of law of the learned justice at special term, expressed as follows: First, that the defendant owns all mines, minerals and ores upon the plaintiff's lands, described in the complaint. Second, that there has been no adverse possession thereof. Third, that it has a right to enter upon plaintiff's premises and to dig through the surface in order to procure such ores. Fourth, and so to do at the place and in the manner in which it has opened and dug their driftway in front of plaintiff's bank wall. Fifth, that there has been no adverse possession sufficient to defeat this right. Sixth, that the defendant has a right to maintain a rail or tramway at the place where the same has been built on the plaintiff's premises for the purpose of working such mine. Seventh, and that the defendant has a right to use and sink a steam engine on the premises of the plaintiff for the purpose of working said mines.

In our judgment the learned justice was correct in arriving at these conclusions. The first, second, third and fifth have been shown to be correct, directly, in the foregoing discussion.

The fourth, sixth, and seventh depend entirely upon the fact of whether the acts therein mentioned were necessary for the profitable and beneficial enjoyment of the property of

the defendant in the minerals. The learned justice has not in terms found as matter of fact that the use in these particulars was thus necessary. And although he has refused to find that all of the use made by the defendant of the plaintiff's ground has been necessary in carrying on the operations of the mine, he has not found, nor has he refused to find, that the use in the particulars comprehended in the above conclusions of law, was not necessary for some lawful purpose of the defendant. So that we are enabled to look into the evidence, and to make inferences therefrom in support of the conclusions of law and the judgment arrived at by him. We find that there is enough in the testimony to sustain a finding of fact that the use of the plaintiff's land was in these particulars thus necessary. We so infer.

The defendant appeals from the judgment, and has excepted to some of the conclusions of fact. We think that the conclusions thus excepted to are immaterial to the questions now in contention, or are sustained by some of the testimony given. The learned justice does, indeed, find that the defendant has caused the plaintiff's land to subside and fall in. We find no testimony of such subsidence, save at the tunneling following the old driftway. And so the finding, made on the request, limits it. The subsidence there is not of the land of the plaintiff, except that which was made by the filling in of the old drift. The learned justice found no damages to have resulted from that subsidence. In that respect the finding of fact is not material. He does find, as a conclusion of law, that the defendant has no right so to work the mine as to deprive the plaintiff's premises of the necessary support to prevent the surface from falling in. As an abstract proposition this is correct. He does adjudge that they be restrained from removing the subjacent support from the plaintiff's premises, so as to cause any portion thereof to subside or fall in.

This looks to the future. It does not apply, nor does it seem to be meant to apply to the falling in on the route of the old cut. And so understood, there is no error in so adjudging. Nor does it seem material to any question really mooted upon this argument. At any rate, as a restraint in the future from doing what it should not do, it can not harm the defend-

ant. We therefore regard the finding of fact, in this particular, as immaterial.

The learned justice found that the blasting was not conducted with the care usual in such cases. The testimony on which to sustain this is not very great. It is true that the effects of the blasting upon the house and reservoir of the plaintiff have been marked; and it is true that it is in the testimony, that it is not usual for the blasts to produce such effects, so that it may be said consequentially that the blasts have not been such, or so conducted as is usual. Yet it is also in the testimony that the house of the plaintiff is peculiarly founded; on the solid rock, some feet below the surface. The effect upon it may be quite as much from this peculiarity of structure, as from the lack of care in the blasting. For the evidence is not variant, that no greater amount of powder is used to a charge than is common among miners. It was, however, a question of fact for the trial court, and there is testimony from which such a finding may be drawn.

It has also excepted to the refusals to find as requested. Certain of these are as fully met as the defendant has a right to insist upon, by a finding of the request, with a qualification which is sustained by portions of the testimony. Some of them are refused where no evil result seems to have followed to the defendant; for no conclusion of law or adjudication has been made inconsistent with the existence of the fact, the finding of which was requested. Those of them in which the defendant requested the learned justice to find that all of the use made by it of the ground was necessary in the operation of the mine, were addressed to the very important issue in the case, upon which much of the testimony taken had a bearing. The learned justice had before him testimony which, if he gave it preponderance, sustains his refusal. Others of requests refused are not now material, or were properly then declined. The important one, as to the blasting, contains several matters, some of which might well have been found, but others which we think that it was in the learned justice to decline, according as he viewed and weighed the variant testimony. Thus it was shown, without contradiction, that it is customary to blast by night as well as day in mining; it was testified that the defendant had taken all the care that it possibly could in blasting,

and had done nothing that was not necessary; that the charges did not exceed one pound of powder to any blast, while blasts are customarily made with twenty-five pounds; it was testified, with no contradiction, that there was no other way of dislodging the ore than by blasting it out. On the other hand it was shown that the effects of the blast were much felt by the plaintiff and his family and his house, and that it was unusual for a house to be so affected by the blasting in a mine. Now, one request refused contained this clause: "The blasts of the defendant have not been unusual in size." We have before commented on the affirmative finding of fact on this subject, and for the same reasons we are obliged to conclude that here was the power in the learned justice to refuse to find as requested. He might infer, from unusual effect, unusual power. Another request refused was that the defendant's operations in blasting had "been conducted with all possible care." The same reason applies to the refusal of this.

The defendant excepts to the several conclusions of law: 1st. That the tramway can not by right be raised above the level of the ground, unless so high as that it may be passed under by horses and carriages. 2d. That it has no right to deposit or keep upon plaintiffs' land any ore or refuse stuff or rubbish, or any barn, stable, blacksmith shop, powder-house or other building. 3d. That it has no right to blast in the night-time, during the hours for sleep. 4th. Nor at any time so as to shake, crack or injure the erections of the plaintiff. 5th. That it has a right to sink a steam-engine on the premises, for the purpose of working said mine, but not in the manner in which it has operated it. 6th. That it has no right so to work the mine as to deprive the plaintiff's premises of the necessary support to prevent the surface from falling in. 7th. To the amount of damages and to the judgment ordered.

The sixth of these findings, for reasons above given, must be construed as holding no more than that the surface, in its natural state, must have sufficient support from the underlying minerals. In this view it is correct.

As to all the rest of these conclusions, except as to one hereafter especially noted, they are right or not, as is found the one controlling question of fact, whether the acts of the defendant to which they refer were or were not necessary for

the profitable and beneficial enjoyment of the defendant's property. We have given our view of the legal principles which should govern such cases as this. It will have been observed that the application of them hinges on this fact. The learned justice has not found it; he has refused to find it. He would find no more than that it was convenient. Whatever might be our opinion as to the necessity of the use if we should look into the testimony, we are not at liberty so to do, to reverse a judgment, when there is any testimony which will sustain him in not so finding. And that there is. One conclusion of law excepted to is this: That the defendant has no right to blast in the night-time, during the hours for sleep. And, based upon this conclusion of law, is an adjudication that it be restrained from blasting upon or underneath the lands of the plaintiff, in the night-time, during the hours usually devoted to sleep. There is no support for this conclusion and adjudication in any of the findings of fact, unless it be these: first, that the blasting in the night-time does disturb the sleep of the plaintiff and his family, and as a consequence affects their health; and second, that the improper and unlawful blasting, in the night-time, has diminished the value of the plaintiff's premises. The first fact stated is not sufficient. It is an effect of the act, the same as the rupture of the surface of the land in driving the cut is an effect of an act. Yet, unless the acts are without necessity, the defendant is not to be restrained. It is usual to blast, and the ore can not be got without it. It is usual in all mines to work and make blasts by night as well as by day. Of course it is, for day is as night down in the mine. The second statement, "improper and unlawful blasting in the night-time," if it be received as a finding of fact, does not warrant the conclusion of law, that the defendant has no right to blast at all in the hours of the night devoted to sleep. It would warrant no conclusion other than that it has no right to blast improperly and unlawfully, and that it be restrained from that. Looking into the testimony to see what facts are shown on this head, we do not find any that will sustain a finding that it is not necessary for the defendant to blast of nights. Rather the contrary. The General Term, it would seem, was of this opinion, for it disallowed the damages awarded the plaintiff on this account, but

it d d not modify the judgment by reversing that part which restrains the blasting at all during sleeping hours.

It will be seen that technically there is but one error of the learned justice who tried the action, so disclosed by the case as to authorize this court, according to settled rules, to disturb the judgment. And yet it will also be seen that the findings of fact, and the request and refusals to find, fail to apply with strictness to the acts and doings of the parties upon these premises, the legal test which will alone exactly and correctly determine their relative rights and duties, that is the test of necessity. As to each of the acts of the defendant complained of, it should have been found as a matter of fact, whether or not it was necessary to be done for the reasonably profitable enjoyment of its property in the minerals. Without this test applied by the courts, the differences between the parties fail to have been correctly and finally determined. For this reason we have concluded, rather than to modify the judgment in the one particular, to reverse it, and to send the case back for a new trial.

In this view it is unnecessary to look into the questions raised as to the various items of damages adjudged.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

Judgment reversed.

SEAMAN v. VAWDREY.

(16 Vesey, Jr., 390. High Court of Chancery, 1810.)

[1] **Reservation unaffected by non-user—Purchaser compensated against ancient exception of minerals.** In an action tried in 1810 to enforce the specific performance of a contract to purchase estates, the defendant claimed compensation for a defect in the title because of a reservation of salt works, mines, etc., with a right of entry, contained in a grant of the premises in 1704. It appeared that the right had never been exercised and that the title had been transferred in 1761 without such reservation. *Held*, that the reservation was good, and the defendant entitled to compensation.

[1] **Abandonment.** The inference of abandonment of a right from *non-user* not applicable to the case of mines.

Power of crown to grant license to mine. Whether under a mere reservation of Royal mines without a right of entry, the Crown can grant a license to enter on the land for the purpose of working them, *quære*.

[2] **In specific performance the vendee may elect to take compensation for an outstanding reservation,** instead of using it as a defense.

The bill prayed the specific performance of a contract by the defendant to purchase estates in the county of Chester. An objection was taken to the title upon the ground that by indentures of lease and release, dated the 26th and 27th of September, 1704, Cicely Croxton conveyed to Peter Yate, his heirs and assigns, the manor and estate of Ravenscroft, subject to the following reservation: Except and always reserved to the said Cicely Croxton and her heirs the wych houses, salt works and brine pits in Ravenscroft, and a piece of land adjoining thereto, parcel of the meadow, wherein the same salt works stood (describing it); and also all springs, veins and mines of brine salt or salt rock in another small parcel of the same meadow; with full liberty, without paying anything, for Cicely Croxton and her heirs, etc., without the let, etc., of Yate, his heirs or assigns, to sink and make any new brine pits, salt pits, etc., and to have free ingress, etc., to take and carry away and do all things necessary.

By the conveyance of 1761 to John Seaman, under whose devise the plaintiff was entitled, no notice was taken of the reservation in the deed of 1704.

[1] *Marvin* v. *Brewster Co.*, 13 M. R. 40.

[2] *Cooper* v. *Denne*, 1 Ves., Jr., 565, note, Sumner's Ed.; *Calcraft* v. *Roebuck*, Id. 221, 226.

The answer insisted that under the said reservation there was in the heirs of Cicely Croxton a right to all the springs, mines, etc., in the land devised; and a right of entry, etc., in respect of which the plaintiff is entitled to compensation. That question was therefore brought on by consent, without an exception, the defendant not making it an objection to the title.

Mr. RICHARDS and Mr. ROUPELL, for the plaintiff, relied on the case of *Lyddal* v. *Weston*, 2 Atk. 19, contending that the salt works existing upon this estate in the year 1704, having been leveled, and from that time no act by or under the title of Mrs. Croxton appearing, a strong presumption arose that she had released or in some way abandoned her right under the reservation in that conveyance, especially as the title was taken in 1761 by a purchaser, with the usual covenants, without the exception, showing a clear conviction at the time that there was no right under that reservation.

Sir SAMUEL ROMILLY and Mr. WETHERELL for the defendant. —The *non-user* of this right proves nothing; the object of such a reservation being, that the party may have the power of exercising the right, when his circumstances may enable him to meet the expense attending such an undertaking. What time can bar such a private right? It is not like a right of way. The ground of presumption in all cases is that the person, seeking to establish the right, has done some act inconsistent with it; but the possession in this instance was not inconsistent with the right claimed, as in the case of a right of way.

THE MASTER OF THE ROLLS (SIR WILLIAM GRANT):

The deed of 1704 contains an express and unequivocal reservation of all mines and veins of salt that might be contained in the estate of Ravenscroft. It was for the purchaser to consider how far it was prudent to take an estate subject to such a lien; but in fact by the terms of the agreement Mrs. Croxton became as much the owner of the mines as Mr. Yate became owner of the soil. The question is, how those, who may now represent her, have lost this property or their right to enter upon the enjoyment of it. Not by any actual grant or release, for none is alleged; but it is said, at this distance of time a release

is to be presumed. I do not clearly see any circumstances from which that presumption is to arise. No adverse possession is alleged. The owner of the soil has had the enjoyment, to which he was entitled by the contract, and which is perfectly consistent with the right of the owner of the mines. If it could be shown that he had wrought any mines himself, or had interrupted the other parties, claiming as representing Mrs. Croxton, under the reservation of the mines, in working them, that would lay a ground upon which the presumption could stand; but nothing is alleged, except the mere absence of any evidence of the exercise of this reserved right; for I do not see how the circumstance that in the conveyance of 1761 no notice is taken of this reservation, can weigh against the persons who represent Mrs. Croxton, if they should think proper to assert her right. There are many cases where from *non-user* of a right the inference of abandonment may fairly be made; but that does not apply to such a case as this. It is not so generally true that the owner of mines does work every mine, which he has a right to work; and therefore the relinquishment of the right can not be presumed from the non-exercise of it. It is well known that mines remain unwrought for generations; that they are frequently purchased or reserved, not only without any view to immediate working, but for the express purpose of keeping them unwrought until other mines shall be exhausted, which may not be for a long period of time. It is impossible therefore to infer that this right is extinguished, though there is no evidence of the exercise of it since the year 1704.

The case of *Lyddal* v. *Weston*, instead of being an authority for the plaintiff appears to me to afford an argument by implication against him. The grounds upon which Lord Hardwicke's judgment goes, are two: first, that upon examination the probability was great that there were no such mines; secondly, that the crown, having merely reserved the mines, without any right of entry, could not grant a license to enter upon another man's estate for the purpose of working them. That position is liable to considerable doubt; as being inconsistent with the resolutions of the judges in the *Case of Mines* in Plowden, 310 (see 336). Lord Hardwicke, however, thought it necessary to assume it before he

could determine against the validity of the purchasers' objection.

Here, first, it is not alleged that there is no probability of mines upon this estate; it is rather admitted that there were; secondly, here is the reservation of a right of entry; upon the want of which Lord Hardwicke laid stress in that case. The defendant chooses to consider this, not as an objection to the title, but as a ground for compensation, and I think he is entitled to such compensation.

BOWLER V. WOLLEY.

(15 East, 444. King's Bench, 1812.)

[1] **Extent of reservation—Exception out of exception.** Vendor conveyed certain closes with buildings thereon *excepting* all mines and coal with liberty to himself to enter and sink pits for getting all such coal, and to erect engines, etc., *excepting* as to such lands as lie within 150 yards of the messuage and buildings, and except any homestead. *Held:* that the exception reserved to the vendor the right to dig coal under the messuage, buildings and homestead, and within 150 yards of the same respectively, but that he was not entitled to sink pits, erect engines, etc., within 150 yards of the messuage or buildings or within the homestead.

The following case was sent by the Lord Chancellor for the opinion of this court:

By indentures of lease and release of the 5th and 6th of April, 1805, the defendant conveyed to the plaintiff in fee all that messuage, dwelling house or tenement, at Birchwood, in the parish of Alfreton, in the county of Derby, with the orchards, buildings, etc., yards, gardens, homesteads and appurtenances thereto belonging, as the same contained together by estimation 1a., 2r., 20p.; and also all those several closes or parcels of inclosed land situate at Birchwood, by the names and containing the quantities therein described, with the rights, members and appurtenances thereto belonging and appertaining, etc., "except and always reserved out of these presents, etc., all mines, veins, beds, lymphs and delphs of coal lying within

[1] *Perkins* v. *Aldrich*, 77 Me. 96.

and under the lands and hereditaments hereinbefore mentioned, with liberty to enter therein and to dig and sink such and so many pits and shafts as shall be proper for getting all such coal, and to slack and coke coals as near the mouths and shafts of the said pits as they conveniently can, and to erect and use any engines for getting or unwatering such coal, and to make any ditches, soughs, drains or dams, where necessary for carrying on and working the said coal works, except as to such lands as lie within 150 yards of the said messuage and building, and except any homestead, and to lay on any of the lands all such materials as are proper for carrying on the said coal works, and to use all necessary or convenient roads for the carrying off and selling the said coals and cokes, or for any other of the above privileges, and all other privileges necessary and convenient for getting, unwatering and selling the said coals and cokes: upon condition that Wolley, his heirs, etc., shall fill up or level all such pits or shafts to a solid level with the surface of the earth around the same within six months after the same shall cease to be used, etc., and restore the same to the state of the adjoining lands, etc., and pay to Bowler, his heirs, etc., yearly 30*s.* an acre for all gangways, and for all coal-pit hills or roads yearly £2, 2*s.* an acre, and shall pay a reasonable compensation for all crops of corn, etc., which shall be injured in working the said colliery, and make good all injuries to any houses or buildings, hedges or fences from the above privileges." The messuage, lands and premises so conveyed consisted of a certain messuage and buildings, yards, gardens, orchard and homestead, containing by estimation 1a., 2r., 20p., (the bounds of which were described in a plan,) and of other lands adjoining to the homestead and buildings. The plaintiff entered on the premises, and afterward the defendant began to sink pits and erect engines and works for digging and taking away coal, part of which works were within the distance of 150 yards from the buildings, and considerably within the distance of 150 yards from the ground called the homestead, on which the buildings stand; and by means of such works the defendant proceeded to dig and carry away great quantities of coal from and under the homestead and the lands and premises lying within 150 yards of the homestead and buildings respectively. The plaintiff in May, 1810, exhibited his bill of complaint in the court of chancery, stating the matters and pray-

ing an injunction to restrain the defendant from erecting engines or works, or working for, digging or getting any coal lying under the messuage or buildings and homestead, or within 150 yards from the messuage and buildings and homestead respectively. And on the 28th of February, 1810, the defendant was enjoined from erecting any engine, working for, digging or getting any coal, and from proceeding in working any shafts then sunk within, under, or upon the homestead, and within 150 yards from the messuage or tenement and homestead, until further order; and the present case was directed to be made for the opinion of this court upon the following questions: Whether, according to the due construction of the indentures of lease and release of the 5th and 6th of April, 1805, the defendant has reserved to himself the right, and is now entitled to dig coals from or under the said messuage or dwelling house and buildings, or from or under the said homestead, or within 150 yards of the said messuage and dwelling house or buildings, or within 150 yards of the said homestead? And if the court should be of opinion in the affirmative, then: Whether the said defendant has, by the said indentures, reserved to himself the right and is now entitled to sink pits and shafts, and erect engines for getting and unwatering such coal, and to make ditches, soughs, drains or dams for working the said coal works, or to any and which of those acts, within 150 yards of the said messuages, dwelling house or buildings, or within 150 yards of the said homestead.

The court, after hearing the case argued by COPLEY for the plaintiff, and by READER, for the defendant, sent the following certificate to the Lord Chancellor:

This case has been argued before us by counsel; we have considered it, and are of opinion that according to the due construction of the said indentures of lease and release of the 5th and 6th days of April, 1805, the said defendant has reserved to himself the right, and is now entitled to dig coals from and under the said messuage or dwelling house and buildings, and from and under the said homestead, and within 150 yards of the said messuage or dwelling house, buildings and homestead: but we are of opinion that he has not, by the said indentures, reserved to himself, and is not now entitled to sink pits or shafts, or erect engines for getting or unwatering such coal, or

to make any ditches, soughs, drains or dams for working the said coal works within 150 yards of the said messuage or dwelling house and buildings, or within the said homestead; but we are of opinion that he is not restricted with respect to the said homestead, further than the said homestead itself.

ELLENBOROUGH,
N. GROSE,
S. LEBLANC,
J. BAYLEY.

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[1]PUTNAM v. SMITH.

(4 Vermont, 622. Supreme Court, 1829.)

Reservation of "all the free stones" confined to stone on surface. The grantor in a deed reserved all the *free-stones* on the land, with the privilege of carrying off said stones. The question being whether this extended to the stone of a ledge under ground, it was *held* that parol evidence was admissible to show the situation of the property at the date of the deed; that there were 30 to 100 tons of free stones then lying on the land, disconnected from any fixed ledge, and that this ledge was not then known; and this being proved, it was *held* that the reservation did not embrace the stone in the ledge.

This was an action of *trover* for sixty tons of freestone, alleged to have been taken and carried away by the defendant, and converted to his own use. It appeared that on the 9th day of August, 1814, the plaintiff conveyed to one Minard sixty acres of the south part of lot No. 5, in the town of Grafton, and the deed contained the following reservation, viz.: "with the reservation of all the free-stones on said land to myself, my heirs, or assigns, with a privilege of carrying off said stones in the most convenient place to the highway." The defendant claimed a right to the stones in question by virtue of a subsequent deed to him from said Minard, conveying, without any reservation, the land above mentioned, and from which the stones were taken. The plaintiff claimed the right to maintain the action by virtue of the said reservation contained in his deed to Minard. At the trial in the county

[1] Cited *Groot* v. *Story*, 44 Vt. 207.

court the plaintiff introduced evidence showing that the defendant had taken and converted to his own use about sixty tons of the stone ledge, on said land, of the kind which in that vicinity is called *freestone*, taking the same from the ledge from six to twelve feet under the surface of the ground; and that the ledge extended southward, and was above the surface and visible from two to four rods south of the place where the defendant dug the stone in question, and a little off of lot No. 5. The defendant produced a deed from the plaintiff to said Minard, dated August 30, 1814, conveying to him two acres of land adjoining the said sixty acres, on the south side, being the same land on which said ledge was above the surface of the earth, as before mentioned; also a deed from Minard to the defendant conveying the said two acres, dated March 20, 1823. The plaintiff objected to the admission of these deeds as evidence; but the court overruled the objection. The defendant then introduced testimony that was objected to by the plaintiff, but was admitted by the court, which tended to show that when the plaintiff conveyed the said sixty acres to Minard, there were from thirty to one hundred tons of freestones lying upon the land, disconnected from any fixed ledge, which were of different sizes, from very small to two or three tons in weight; that these were somewhat imbedded in the earth, the upper parts being above ground and the most elevated points weatherbeaten and of no value; but lower down they were solid and were useful for fire places, jambs, manteltrees and inkstands; that at that time no ledges were worked or opened in the vicinity of the ledge in question; and that it was not then known that said ledge extended under the surface as far north as the place where the defendant severed the stones in question.

The plaintiff requested the court to instruct the jury that said reservation included all the freestone and free stones upon the said sixty acres, as well the fixed ledges, as the loose stones. But the court charged the jury that if they believed the testimony above mentioned with regard to the situation and quantity of stones upon the surface, and the situation of the ledge, as then unknown to the parties, they would consider the reservation satisfied without extending to said ledge. The plaintiff excepted to the decision and charge of the court: whereupon the cause was ordered to pass to this court.

EVERETT, for plaintiff.

BRADLEY, PHELPS and KELLOGG, for defendant.

TURNER, J.

This case has been so elaborately argued that it is not necessary in deciding it, to enter into a minute and particular investigation of the several questions raised in the county court. As to the deeds which were objected to, and admitted, they were of no importance; they had no legal bearing on the case, nor were they calculated to mislead the jury. The only point is, whether the stone in question was included in the reservation contained in the deed from the plaintiff to William Minard. If the property passed by that deed it is of no importance to the plaintiff in whom it was ultimately vested, or what a subsequent grantee might think of the rights acquired by virtue of it.

The principal points raised at the trial in the county court were, 1st. Did the deed, on the face of it, reserve the ledge from which the stone in question was taken? and 2d. Was parol evidence admissible to explain the deed, or, in other words, to direct the application of it? The county court considered it doubtful whether it was the intention of the grantor, and so understood by the grantee, that the ledge in question should be reserved; and they admitted parol evidence to show the situation of the premises at the time of the conveyance. It is not now important for us to decide, whether the deed, on the face of it, conveyed the property in question or not, as the parol evidence was admitted, and if legally so, then the deed is to be construed in connection with the evidence. So it becomes important to decide with regard to the legality of admitting the parol evidence.

The rules of law with regard to the interpretation of deeds have been long since settled, and, as the court believe, settled on the soundest principles of public policy and general utility. Where the ambiguity arises on the face of the instrument, it must be solved by the deed itself. But if the meaning of a deed is clear and plain on the face of it, but doubts arise on the application of it, those doubts may be removed by extrinsic or parol evidence. The deed in question is plain

on the face of it; it reserved all the freestones on the land and the right of carrying them off to the highway. Every person would clearly understand what was meant by the reservation. But in carrying the contract into effect doubts arise from the situation of the property at the time of making the grant; and on the clearest principles of law, these doubts may be solved by extrinsic circumstances, showing that it could not have been the understanding of the parties that the reservation in the deed should extend to the ledge in question. We consider that the evidence was legally admitted, and that, taking the deed in connection with the parol evidence, the construction which the county court gave to it fully carried into effect the original intention of the parties.

The case of *Leonard* v. *Judd*, Brayton, 230, is very shortly and loosely reported, and it would not be safe to settle any legal principles on the authority of that case. That, as it appears from the report, was a case of a lease of 999 years, of certain premises, with the privilege of taking all the rocks and stones on the land. The court decided that the lessee was not liable for digging, to any extent, for rocks, provided he did not wantonly dig up the land to the injury of the lessor. We do not see how any question could have arisen in that case. The lessee would have had a right to occupy and possess the land during the whole term if the rocks and stones had not been mentioned in the lease; and, most assuredly, when liberty was directly given by the lease to take the rocks and stones, the lessee had a right to make use of proper means to get them. It must be presumed that the rocks and stones were, at least, a part of the object which the lessee had in view in procuring the lease. That case has but a very remote resemblance to a case where one sells a farm and reserves the right of carrying off the free stones on the land to the highway.

From a careful examination of all the authorities cited, and others which were thought to have a bearing on the cause, we think the decision and charge of the county court were right, and that the reservation in the deed, taken in connection with the extrinsic evidence introduced on the trial, did not extend to the quarry beneath the surface of the earth, from which the stone in question was taken.

Judgment of the county court affirmed.

GIBSON v. TYSON.

(5 Watts, 34. Supreme Court of Pennsylvania, 1836.)

Reservation of "mineral or magnesia of any kind." B. by deed conveyed to F. a tract of land in fee simple "excepting and reserving for himself, his heirs, executors, administrators and assigns, all mineral or magnesia of any kind, and to convey the same away through the premises intended to be sold, so as to do as little damage to the owner as possible, with all bricks and blocks of soapstone, as I, the said "B," may want for my own use." *Held:* That this was such a reservation as entitled the grantor to chromate of iron, afterward found.

[1]**The effect of the adjective "all"** in connection with minerals, considered.

Where the land was known to contain minerals of some character, although the proper name and real value were unknown to the parties, a reservation of "all" minerals, although used in connection with a particular mineral, *held* to be an unqualified exception of all minerals in the reservation in contention.

Writ of error to the District Court of Lancaster County.

This is an action of replevin, in which the plaintiff, Isaac Tyson, Jr., claims thirty-five tons of chromate of iron as having been taken from him by William Gibson, the defendant.

The latter pleaded that this chrome was his own property, which the plaintiff denied; and upon that fact the issue between them depended.

In 1820, David Brown purchased at sheriff's sale a tract of land in Little Britain township, containing 130 acres, more or less, with a small stone house and small stable thereon for the sum of $425.

On the third of April, 1830, he agreed, in consideration of the sum of $500, to sell and convey this tract of land to Vincent Field, his heirs and assigns, "excepting and reserving for himself, his heirs, executors, administrators and assigns, *all mineral or magnesia of any kind*, and to convey the same away through the premises intended to be sold, so as to do as little damage to the holder as possible, with all bricks and blocks of soapstone as I, the said Brown, may want for my own use."

[1] *Shoenberger* v. *Lyon*, 13 M. R. 88; *Grubb* v. *Bayard*, 9 M. R. 199.

On the 9th day of September, A. D. 1831, David Brown and his wife, by their deed of that date, did convey and assure for the consideration aforesaid, to the said Vincent Field, the tract of land above mentioned; which deed contains the same exception and reservation above mentioned and in the same words.

On the 25th day of February, 1831, Vincent Field entered into an agreement with William Gibson, in which for and in consideration of the sum of $175.04 he sold all his right, title and interest ("excepting a reserve mentioned in an article between David Brown and Vincent Field") to a part of the tract of land containing sixty-three acres, more or less, to the said William Gibson, his heirs and assigns, and engaged to convey to him and his assigns the same premises, except about four acres, which he was to convey to Joseph Smedley, in pursuance of an article between William Gibson and him.

On the 13th of September, 1831, Vincent Field and wife, for the consideration expressed in the above agreement, conveyed and assured to William Gibson, his heirs and assigns, the part of the tract agreed as above mentioned to be conveyed, describing it by metes and bounds, "containing sixty acres more or less, together with all and singular the rights, members and appurtenances whatsoever thereunto belonging, or any wise appertaining thereunto, and the reversions and remainders, rents, issues, and profits thereof (excepting and reserving for himself, his heirs, executors, administrators and assigns, all mineral or magnesia of any kind, and to convey the same away through the premises intended to be sold, so as to do as little damage to the holder as possible, with all bricks and blocks of soapstone, as I, the said Vincent, may want for my own use)."

It is under this deed that William Gibson, the defendant, claims the property in the chrome, which is the subject of this controversy.

The plaintiff claims under the reservation in the articles and deed of David Brown to Vincent Field, as follows:

David Brown, on the 18th of November, 1830, by articles of agreement with Mahlon H. West, granted to him and his assigns the exclusive title, right and privilege of digging, etc., and removing from a tract of land sold by the said Brown to

Vincent Field, lying in Little Britain township, chromate of iron and magnesia mineral for the term of three years, etc.

On the 18th of May, 1831, Mahlon H. West assigned these articles to Isaac Tyson, Jr., the defendant; under this agreement he proceeded to dig and raise the ore in question.

The plaintiff requested the court to charge the jury on the following points of law:

1. That the plaintiff has shown full title to the ore in dispute, for the reservation in the article of agreement of 3d April, 1830, and in the deed of 9th September, 1831, from David Brown to Vincent Field, vested Brown with the right to all minerals of every description found on the premises sold; and this agreement of the 18th of November, 1830, with Mahlon H. West, and the subsequent assignment of it on the 5th of April, 1831, conveyed to the plaintiff, during its continuance, all the right reserved by Brown, and hence the verdict should be in favor of the plaintiff, for the value of the ore agreed upon by the parties.

2. That upon the evidence given in the cause the true construction of the reservation in the article of agreement of the 3d of April, 1830, and in the deed of the 9th of September, 1831, can only be attained by extending it to all minerals; for to restrict it to the article of magnesia would be to destroy the manifest intention of the parties, to whom the existence of chrome on the premises as a mineral was known; the parol testimony leaving it uncertain whether there be any magnesia there at all, and whether it was considered by them as a mineral or not.

3. That if the construction of the reservation be at all doubtful, yet as it is in the disjunctive, the right of election is with the grantor, David Brown, and his assigns.

The defendant requested the court to charge the jury upon the following points:

1. That the intention and meaning of the parties are the best guide to the proper construction of every contract; and to give effect to this intent, the ordinary import of words may be restrained, the rule being that when a grant is in general terms, the addition of a particular circumstance will operate by way of restriction and modification.

2. The true construction of the reservation in the con-

tract in question, "all mineral or magnesia, etc., and all bricks and blocks of soapstone," etc., is, that the subsequent restrictive words are to be taken as explanatory of the former; and the reservation is, therefore, restricted to the particular minerals specified in such reservation.

3. That the circumstances attending a transaction may be called in aid to explain the intent of the parties, and if the jury believe that at the time of the agreement between Brown and Field, on the 3d of April, 1830, neither party knew of the existence of chrome nor had it in contemplation, the construction, to give effect to the intent will restrain the general terms used to the particular articles specified in the reservation. The rule of law being that an exception shall be taken most favorably to the grantee, and, if there be any uncertainty or ambiguity, the grantee has the benefit which may arise from such defect.

HAYES, President.

Whether the chromate of iron, for which this action of replevin is brought, is the property of William Gibson or not, must be ascertained from the true construction of the exception and reservation in the agreement and deed from David Brown to Vincent Field.

The question is whether chromate of iron is, or is not, included in the exception and reservation of "all mineral or magnesia of any kind." There can be no doubt that it is a mineral; all minerals, therefore, would include it. But, for defendant it is contended that the words "all mineral," are to be restrained by what follows, "or magnesia;" that they are used in this clause as synonymous with magnesia as the disjunctive "or" clearly indicates; that the term minerals, taken in its utmost latitude, would include everything beneath the surface, or that might be dug out of the soil, excepting plants and vegetables alone, which could not have been the idea of the parties in this reservation; that magnesia being a mineral, it would be absurd to suppose that the parties intended something additional to, or besides minerals, by using that word; that with respect to chrome, there is no evidence that it was known to these parties as existing on the premises at the time

of the articles executed between Brown and Field on the 3d of April, 1830, which is manifest from the fact, proved by Vincent Field, that Brown valued the reservation at $50 only.

On the part of the plaintiff, it is said that the construction insisted on by the defendant, violates a primary rule of interpretation, which seeks to give effect to every term of a contract, *ut res magis valeat quam pereat*, that to attain this construction it is necessary to throw out five words without assigning to them any meaning whatever; that there being no magnesia found on the premises, this construction in effect renders the whole reservation inoperative; that the disjunctive *or* implies a difference, not identity; and that the parties did probably suppose magnesia to be something else than a mineral; that the words "of any kind" show that the previous words "all minerals" were to be taken in a comprehensive sense, and the whole context requires that "or" should be construed as "and"; that upon such construction every word will have its operation, and the intent of the parties will be carried into effect.

The intention of the parties is what all interpretation, where the subject-matter of a contract is lawful, must aim at discovering. This constitutes the agreement, no matter what words are used. It is the consenting minds—the concurring thought and will of the parties at the time of the agreement —that justice is called in to aid and to uphold.

But language being the chosen medium of communicating and means of fixing the intention, where the terms are clear and explicit, and can be carried into effect, it is unnecessary and, indeed, improper to go further. Ambiguity is patent or open when it appears on the face of the contract; latent, when the expressions, considered in themselves, are free from confusion, but become doubtful and uncertain, when applied to the subject-matter. The Supreme Court must have considered such ambiguity as existing in this case, having sent the same down to supply a deficiency in the case stated by the introduction of additional facts. Much evidence has been received going to show the transactions and knowledge of the parties, Field and Brown and Gibson, at the period when the reservation in question was made.

Let us first consider the terms of the reservation, independ-

ently of the extraneous facts; and then in connection with them:

1. The words "all mineral or magnesia of any kind" would appear to carry, of themselves, something more than magnesia alone; for if magnesia only were meant to be reserved, why use the other terms at all, or why use "all minerals" first? That *or* is sometimes used between two words bearing the same import, in the sense of the Latin *alias*, is not to be denied; but in these cases, it is believed, you may always transpose the equivalent terms without injury to the sense, the two being exactly synonymous. But here if all mineral means magnesia you can not say, *e converso*, that magnesia means all minerals. The words "of any kind" also appear to belong by congruity of signification, though not by juxtaposition, to the term "all minerals." But attach them to which you will, they are equally inconsistent with the asserted synonymy of the phrases "all minerals" and "magnesia." Was it ever heard in any region that the common understanding of the country assigned the same meaning to those terms? that all minerals were nothing but magnesia? This were a simplification beyond the dreams of philosophy.

The sense in which the words of a contract are to be understood, is the ordinary one—agreeable to the common acceptation. The term "mineral" is not very definite as to its limits; but I will venture to say that in general and popular use, it means all ores and other metallic substances found beneath the surface of the earth, and all other substances which are the object of mining operation. Unquestionably where magnesia is found beneath the surface, as it generally is, it is a mineral. In this contract I am inclined, however, to think with the plaintiff's counsel, that the parties were under some apprehension that magnesia was not properly comprehended by the term mineral; that knowing it only by its usual form as a drug or medicine, they thought it necessary to express it as reserved, lest the general term mineral might not include it. This idea affords an additional argument for annexing the ensuing words "of any kind" to the term mineral, rather than to magnesia, since the manifest ignorance of the parties forbids the supposition that they were aware of the various combinations in which magnesia is found, the hydrates, the carbonates, the sulphates, etc.

From this view of the phraseology employed in the reservation, it is clear that the conjunction "or" must be construed "and"—a construction which, when demanded by the sense, is sanctioned by many precedents.

The phrascology of the reservation being thus adjusted, the question simply is, whether chromate of iron be a mineral or not.

It is answered by the remark that this is a metallic substance found beneath the surface of the soil; it is therefore a mineral. This conclusion has not been denied by the defendant; but the argument of his counsel went to maintain, in the first place, the position that by mineral nothing more was meant than magnesia; and secondly, that chrome was not in the contemplation of the parties, being unknown to them at the making of their agreement on the 3d of April, 1830. The first position was confined to the patent ambiguity; the second to the latent.

2. As a latent ambiguity is shown to exist by extrinsic testimony, it must, by such testimony, be explained.

The testimony in the present case, which has been adduced for that purpose, proves it to have been long believed in the neighborhood that this tract of land, and especially that part of it called Soapstone Hill, contained some valuable minerals. For some time it was thought there was silver upon it. Searches were made upwards of fifty years ago for the metal. Holes were dug, and some of the minerals obtained from them were carried to England for analysis. The tract was originally "taken up" as mine land, and so called. The testimony further shows that at the time David Brown entered into his agreement with Field, he was aware of this belief and entertained it himself, though he was uncertain with respect to the species, properties or characters of the minerals. He spoke of gold, silver and magnesia. In consequence of this belief he made the reservation in the articles, which were deliberately framed, after much consultation with his family. It appears that soon afterward, and long before he executed his deed to Vincent Field, he was informed of the existence of chrome, so called, upon the land, and more than nine months previous to that time he entered into the contract with Mahlon H. West, granting him the exclusive privilege of raising and

taking away chromate of iron and magnesia for three years; that Vincent Field, in the meantime, knew of searches which were made on this tract for minerals without interfering to prevent them or making any objection; but, on the contrary, assisted, a few weeks after his contract, in showing D. Brown and the person who first discovered chrome and designated it as such, where his father had, many years before, dug in search of silver and thrown out a quantity of this mineral, now known to be chrome; that the existence of it on the Soapstone Hill had been long known to others, who were not apprised of its properties or name.

It appears, then, that both parties, Brown and Field, came to the knowledge of the fact that the mineral called chrome or chromate of iron, was found on this tract before the indenture between them of the 9th of September, 1831, was executed, in which indenture the identical reservation of the articles of the 3d of April, 1830, is repeated *verbatim*. Although Brown had nine months before granted, under this reservation, the exclusive privilege of raising and taking away this very mineral, and Field knew it, and knew that men had been employed in digging it up for the person holding that lease or privilege, yet neither Brown nor Field thought of altering or modifying the reservation, as not being sufficiently comprehensive to include chromate of iron; nor did the latter complain, at any time, that Brown in granting the privilege of digging and carrying away the chromate of iron, was acting out of his reservation, or encroaching upon his, Field's, right; and his forbearance to notice this was not the less remarkable from the fact that he had himself previously entered into a contract with William Gibson to convey that part of the tract to him on which this mineral had been found.

These facts do, in my opinion, remove every shadow of doubt that the parties did intend, by the terms of the reservation, to include the chromate of iron, and did understand, at the consummation of their contract by the deed of the 7th of September, 1831, that this mineral was reserved.

I accordingly think that the verdict in the present case ought to be rendered for the plaintiff.

CHAMPNEYS and ELLMAKER, for plaintiff in error.

MONTGOMERY and JENKINS, for defendant in error.

The opinion of the court was delivered by KENNEDY, J.

There is nothing in the first two errors assigned that would justify or warrant a reversal of the judgment, for the evidence given under these exceptions was not such as could have, in the slightest degree, prejudiced the defendant below with the jury. But admitting, for the sake of argument, that the evidence objected to might have influenced the jury in deciding facts improperly against the defendant below, still, I should doubt the propriety of reversing the judgment for this reason, if, from the other facts and circumstances testified to by the witnesses, taken in connection with the language of the exception in the deed, we should be of opinion that the plaintiff below was entitled to recover; for the parties having by consent withdrawn the case from the jury, and agreed that all the facts which the whole evidence tended to prove should be considered as found by the jury in the form of a special verdict, and that the same should be submitted under that view to the court for its decision, I confess that I can perceive no good objection to the court's separating and excluding from its consideration all these facts, proved exclusively to exist by the evidence improperly admitted, and thus decide the case entirely upon the facts established by the adduction of the proper evidence.

The three remaining errors grew out of the construction which the court put on the exception contained in the deed from David Brown and his wife to Vincent Field, and the facts and circumstances having relation thereto, which were given in evidence, or may perhaps more properly be said to be exceptions to the course of reasoning pursued by the judge in coming to the conclusion that he did, but in truth may be considered as one error, to wit, that the court erred in giving judgment for the plaintiff, instead of the defendant below. If the judgment be such as the court below ought to have given, it is immaterial whether the reasons assigned for it be the best that might have been advanced, or whether they tend to support the judgment at all or not; a critical examination, therefore, of them, is unnecessary; but still I do not wish to

be understood as insinuating that they, or any of them, are exceptionable in any respect whatever.

It appears to me that the facts and circumstances testified to by the witnesses, when taken in connection with the words of the exception in the deed, are sufficient to support the claim of the plaintiff below. The construction of all instruments of writing ought to be favorable, and as near to the minds and apparent intent of the parties as possible it may be and the law will permit, for *benigne sunt faciendae interpretationes chartarum propter simplicitatem laicorum. Et verba intentioni non e contra debent inservire:* Co. Litt. 313; Litt. Sec. 563; Plowd. 154, 160; 1 Shep. Touch. 86. Agreements ought, most certainly, to be construed according to the meaning and understanding which the parties had of them at the time they were made and entered into; for it is perfectly manifest that if the meaning and intention of the parties be disregarded or departed from in attempting to put a construction upon their agreement, it is in reality making a new agreement between them instead of expounding the old; and it must be admitted that neither courts nor juries have the power to do this; the first, and indeed the only matter then is, to ascertain, if possible, what the parties intended and gave their assent to, by making the agreement in question.

I can not believe, as has been contended by the counsel for the plaintiff in error, that it would comport with their intention to consider the term "magnesia" an explanation and restriction merely of the preceding words, "all minerals," because, had they known the meaning of those terms among those who have any scientific knowledge on the subject, it is utterly impossible that they, intending to except magnesia alone out of the grant, could ever have thought of introducing into the exception, with that view, the words "all minerals." But supposing the parties to be, as certainly they were, entirely destitute of all scientific knowledge in regard to such things, the introduction of these words is easily accounted for. With the bulk of mankind magnesia is not considered a mineral at all. Nothing is thought by them to be such unless it be of a metallic nature, such as gold, silver, iron, copper, lead, etc.; magnesia, therefore, could not have been considered by the parties as a qualification or restriction of the preceding

words, "all minerals," but was clearly intended as an addition thereto. Besides, is it not rather absurd to suppose that they would have used the adjunct "all," in connection with the noun "minerals," if they had intended using the term "magnesia" for the purpose of restricting or confining the exception to that particular species of mineral. I also think that the words "of any kind," immediately following the word "magnesia," tend still further to show that the parties intended to embrace magnesia within the exception, in addition to what they considered minerals, because magnesia is very little known, if at all, to most of the people in the country, except in the one form in which they use it occasionally as a medicine, and they have no knowledge whatever of there being more kinds than one of it; and hence I infer that the words "of any kind" were used in reference to the word "minerals" alone, of which everybody knows and believes there are several kinds. But if any possible doubt could remain as to the magnesia being considered by the parties as something in addition to the minerals mentioned in the exception, it is removed by the testimony of Vincent Field, the party himself to the contract, from whom the plaintiff in error derives his claim to the property in dispute, and whom he has also produced as his witness. He testifies that when he came to read the article, before signing it, "he found in it mineral and magnesia; that he then said to Brown, nothing had been mentioned about magnesia; that he expected he was to have the magnesia; to which Brown replied that 'he thought proper to reserve it, and if the witness chose to take the property in that way, well and good;'" thus showing, most explicitly, that the magnesia was considered by them as something different from minerals, to the reservation of which latter no objection whatever was made, but merely to the magnesia, because it was something new that had been superadded, without any previous mention being made of it in making the bargain.

But it has been objected that according to the ordinary and common acceptation of the term "mineral," chrome is not included within the exception, because, although properly a mineral, yet, not being a metallic substance, it is not considered by the great mass of mankind as a mineral, and embraced within that term. This objection would certainly have great

weight, and perhaps could not be easily overcome were it not for the parol evidence, and the facts established by it. This evidence, however, shows very clearly that it was that which is now known to be chrome that, on the first taking up of the land in which it is found, gave to it the name of "mine land;" that it was thought to be a metallic ore of some kind, and spoken of frequently as containing some gold or silver. From the testimony of Field himself it is plain that this is the same material to which Brown had particular reference when Field talked of buying the land of him; and it can not be doubted, I think, that he had the term "minerals" introduced into the exception contained in the article of agreement, for the especial purpose, it would seem, of embracing it, let it be what it might, so it were a mineral of more than ordinary value. Vincent Field says that Brown called it the "precious stuff," when he first proposed buying the land of him. And again, when they made their verbal agreement, he talked of reserving the gold and silver, supposing, doubtless, that this substance might contain a portion of one or other, if not both of these metals, and evidently alluded to it in such a way as to be so understood by Field himself; but when he comes to have the agreement reduced to writing he does not confine or restrict himself by reserving merely the gold and silver, but excepts "all minerals of any kind," or, in other words, "of *every kind whatsoever*." It also appears from the evidence that Gibson, the plaintiff in error, was present when the contract was concluded between Brown and Field, and that Gibson, after he bought of Field, seemingly admitted that, under the exception in the deed, Brown or his assignees had a right to the chrome found on the surface of the land, but not to that which was under it. This looks somewhat like an attempt on his part to evade what he felt conscious was the true meaning of the exception, that chrome was really embraced within it. Now, as the *substance* in question turns out to be a mineral, and one of very considerable value too, I think it would be going too far to hold, under all the circumstances given in evidence, that it was not intended to be included within the exception. And though Field swears that he did not know what *mineral* meant, and in this state of ignorance signed the agreement, yet this ought not to affect the rights of Brown,

or those claiming under him, because Field might have inquired and informed himself of it, if he did not know. And as he did not disclose his ignorance, it can not be even pretended that Brown was bound to give or to attempt any explanation of it to him.

Judgment affirmed.

BAKER ET AL. v. MCDOWELL.

(3 Watts & Sergeant, 358. Supreme Court of Pennsylvania, 1842.)

Reservation of moiety of ore where the other moiety was outstanding in another. B., seized in fee of a tract of land, subject to an outstanding title to one half of all iron ore found on the premises, conveyed the same to H. in fee, "excepting and reserving to the said B., his heirs and assigns, the one half of all iron ore found on the premises." *Held*, to be a reservation to the grantor himself of that half of the ore which was vested in him, and not a mere notice of the reservation of the other half which was outstanding.

Error to the Common Pleas of Huntingdon County.

Samuel McDowell against Elias Baker and Roland Diller. This was an action of trover and conversion, to recover the price of one half of 291 tons of iron ore.

Andrew Henderson being seized of a tract of land, conveyed the same in fee to Thomas Blair, with the following reservation: "Excepting and reserving thereout to Andrew Henderson, his heirs and assigns forever, the one half of all iron ore found, and to be found, in and upon the said premises: together with the right and privilege to enter in and upon the said premises and every part thereof, to dig, raise, search for and carry away with such teams as Andrew Henderson may choose; doing, nevertheless, as little damage and creating as little inconvenience to Thomas Blair, his heirs and assigns, as possible, in executing this reserved right."

After the death of Thomas Blair, his heirs at law conveyed the same tract of land to Patrick Hamilton, "together with all and singular, the rights, liberties, privileges, immunities, hereditaments and appurtenances whatsoever to the same belong-

ing or in anywise appertaining, and the reversions, rents, issues and profits thereof, and all the estate, right, title and interest either at law or in equity of them, the said John Blair and Barbara, his wife, Ruth Moore, Alexander Blair and George Buchanan and Catherine, his wife, of, in, to and out of the same; to have and to hold all and singular the hereby granted premises with the appurtenances, unto the said Patrick Hamilton, his heirs and assigns, to his and their own proper use, benefit and behoof forever; excepting and reserving thereout to the said John Blair and Barbara, his wife, Ruth Moore, Alexander Blair and George Buchanan and Catherine, his wife, their heirs and assigns forever, the one half of all iron ore found or to be found, in or upon the premises; together with the right and privilege to enter in and upon the premises and every part thereof, to dig, raise and search for, and carry away the same with such teams as they may choose; doing, nevertheless, as little damage and creating as little inconvenience as possible, to the said Patrick Hamilton, his heirs and assigns, in exercising this reserved right."

The defendants having the title of Andrew Henderson to one half of the ore, entered upon the land and dug and carried away the 291 tons in controversy. The plaintiff, who claimed under Patrick Hamilton, sought to recover the price of one half of the ore taken away by the defendants. The question arose upon the construction of the deed of the heirs of Thomas Blair to Patrick Hamilton. The plaintiff contended that the reservation contained in it had relation to that half of the title to the iron ore which was reserved to and vested in Andrew Henderson, and was to be construed as a notice to the grantees of that outstanding title. The defendants, who claimed title under Andrew Henderson, contended that Patrick Hamilton took the land subject to the reservation of the title to that half of the iron ore which was vested in the grantors, and therefore the plaintiff had no right to any part of the ore.

The court below was of opinion with the plaintiff, that it was not the intention of the heirs of Thomas Blair to reserve to themselves the right to one half of the ore, but to reserve that half which was outstanding in Andrew Henderson and vest the land and the other half in the grantees. The same question was argued here by

MILES and BLANCHARD, for plaintiffs in error.

BELL, for defendant in error.

The opinion of the court was delivered by GIBSON, C. J.

The deed which gives rise to the question is a conveyance of the land, together with "the rights, liberties, privileges, immunities, hereditaments and appurtenances," and the "reversions, rents, issues and profits thereof, and all the estate, right, title and interest" of the grantors: whence the judge who tried the cause seems to have thought that it was necessary for them, in order to save themselves from being implicated in a breach of their warranty, to restrain the general terms of the grant by repeating, in the *habendum*, the reservation which Henderson had made in his deed to Blair, their ancestor. Now, in the first place, there is nothing in this deed of Blair's heirs which would purport without such a repetition to pass the ore further than they had power to pass it. Henderson's reservation of a moiety of it operated by excepting it from the rest of the thing granted; and his part of it, being parcel of the soil, was not one of the things particularly enumerated as subjects of the grant. By their conveyance of the land the heirs of Blair did not profess to pass more than their estate in it; and the usual flourish about those incorporeal rights which are incidental to the ownership, did not purport to pass the ore, which was a different *corpus* from anything mentioned in it. Again: had the grantors pretended to pass the land discharged of Henderson's reservation, they would not have broken their warranty, which, being a special one, extended no further than to incumbrances created or suffered by themselves. But Henderson's reservation operating as it did, by way of exception, was not an incumbrance of any sort; and if it were, it was not created by the grantors. Lying within the knowledge of the grantee when he purchased, it would not even be a defense on the ground of failure of consideration, to an action for the purchase money. The reservation of Blair's heirs, therefore, was unnecessary to secure anything but their own moiety of the ore—certainly not to apprise their grantee of the existence of Henderson's reserva-

tion, of which, lying as it did in the channel of the title he was purchasing, he was bound to take notice. It is possible they may have been so far mistaken in their judgment of the law as to think otherwise; but in that case why declare the reservation to be not for Henderson, but for themselves? If the purpose was to show conclusively that his part of the ore was not pretended to be conveyed, the obvious way to effect it was to convey the land expressly subject to his interest in it. A clause to that effect would have evinced an intent not to be mistaken; but that this reservation was introduced to except what did not belong to the grantors is altogether improbable. Why reserve what they had not power to pass? Were we at liberty to weigh probabilities, we would have more reason to think they actually intended to reserve the moiety of the ore for their own use, than that they intended to guard themselves from future difficulty in regard to the prior reservation. But though a deed is to be interpreted so as to accord, as nearly as may be, with the apparent design of the parties, we are not to be governed by conjecture in regard to the actual state of it. We are furnished with guides to greater certainty of result, and with at least an equal chance to reach the actual meaning. The law presumes that every man intends the legal consequences of his words; and hence it is that no allowance is made in the construction of deeds for unskillfulness in the use of language. Even the words of a will, in respect to which the rigor of the principle is somewhat abated, are understood in their legal sense where an intent to use them in a different one is not apparent from the context. We are bound to assume, then, that these grantors knew the legal effect of their words, as well as the rules by which they were to be construed; one of which is, every part of a deed must be allowed to operate where it may and every word to take effect. Now, by referring this reservation to Henderson's moiety, we would deprive it of its power, for his reservation had left nothing remaining but the other moiety to be the subject of future exception; but by referring it to that other moiety, we put all the parts of the instrument in harmonious action. Its legal effect, therefore, is to except from the grant that which was susceptible of exception—the part of the ore which was the property of the grantors.

Judgment reversed.

SHOENBERGER ET AL. V. LYON ET AL.

(7 Watts & Sergeant, 184. Bl. & W. Lead. Cas. on Mines, 227. Supreme Court of Pennsylvania, 1844.)

[1] **Reservation, large as the grant.** A reservation in a deed of conveyance, which is as large as the grant itself, is void, and the grant will stand unaffected thereby.

Application of the rule to the facts. S. and L. being tenants in common of Huntingdon Furnace, and of lands appurtenant thereto, and also of the mineral rights in a certain tract of land, L. conveyed to S. all his interest in the premises excepting and reserving "the full undivided half part of all the iron ore which may, at any time, be found on any of the land now belonging to Huntingdon Furnace," etc.: *Held*, that this reservation could not be held to apply to that tract in which the only interest owned was the ores, as the reserving clause would take back as much as the granting clause had given.

All ores, treated as all known ores. The fact that the granting clause covered all ores, and the reservation was of iron ore only: *Held*, not to vary the rule when the iron ore was the only ore known in that region, and the reservation originally made for the benefit of a furnace operator.

Form of reservation of ores—set forth at length in statement of the case.

Error to the Common Pleas of Huntingdon County.

John H. Shoenberger and George K. Shoenberger v. *John Lyon, Anthony Shorb, David Stewart, William C. Stewart and George Riter.*

This was an action of ejectment "for ten acres of land, containing an ore-bank, situate in Warriors-mark Township, Huntingdon County, called Guno Ore Bank."

"And now, to wit, the 17th April, 1838, a jury being sworn on the issue joined, return the following special verdict, that is to say: They find that on the 1st of June, 1812, John Gloninger & Co. conveyed the land in question to Daniel Beck, (reserving, among other rights, that of digging ore) *prout* deed. That at that time the firm of John Gloninger & Co., were John Gloninger, George Anshuts, Martin Dubbs, who each owned one fourth of Huntingdon Furnace, etc., and Dr. P. Shoenberger and Abraham Hackman, the other fourth. Subsequently, Abraham Hackman conveyed his interest to

[1] *Cutler* v. *Tufts*, 3 Pick. 277; *Carradine* v. *Carradin*, 33 Miss. 698.

Dr. P. Shoenberger; Dr. Shoenberger also became the owner of the interest of Martin Dubbs. The defendants (except Riter, who is a manager) became the owners of the interests of John Gloninger and George Anshuts. Huntingdon Furnace was conducted, for some time immediately before the releases hereafter referred to, by Dr. Shoenberger and the defendants, according to their respective rights in the same.

"The jury further find that Bald Eagle Furnace was owned by John Gloninger, Martin Dubbs and George Anshuts, each one third. That Dr. Shoenberger purchased the interest of Martin Dubbs, and the defendants the interests of John Gloninger and George Anshuts; and that they conducted the said furnace, immediately before the releases hereinafter referred to, according to their rights in the same.

"The jury find that on the 17th August, 1835, the deed of release of the defendants to Dr. Peter Shoenberger was executed and delivered for half of Huntingdon Furnace and Elizabeth Forge (*prout* deed). And that, by articles dated the 18th July, 1835, Peter Shoenberger granted Huntingdon Furnace and Elizabeth Forge, with their lands, etc., to George K. and John H. Shoenberger, the plaintiffs, in fee: and the plaintiffs entered into possession thereof, in pursuance of the said articles, before this action brought.

"The jury further find that on the 22d February, 1797, Job Packer and wife conveyed to John Canan three tracts of land, one of which is the Beck tract; that on the 20th September, 1810, John Canan, by deed of assignment, conveyed the land in the deed of Job Packer and wife to John Gloninger & Co., as tenants in common. Also, that on the 10th of August, 1808, M. Massey conveyed to George Shoenberger the one fourth of Huntingdon Furnace; and on the same day M. Massey conveyed to John Gloninger the whole of Huntingdon Furnace, reserving the one fourth. Also, that on the 29th October, 1831, John Gloninger and wife conveyed to A. Shorb, John Lyon, David Stewart, and John Forster, the one fourth of Huntingdon Furnace, etc. Also, a deed from George Anshuts and wife, to the same persons, for another fourth. Also, a deed from the Farmers' and Mechanics' Bank, and Paul Beck, Jr., to Dr. Peter Shoenberger, for another fourth of Huntingdon Furnace, etc., being the fourth held by Martin Dubbs.

"The jury further find that Dr. Peter Shoenberger and wife executed a deed of release of the one third of Bald Eagle Furnace and the Tyrone Forges, of the land, etc., recited therein, on the 17th August, 1835 (*prout* deed).

"The jury find that the defendants are in possession for the purpose of raising ore, and have raised ore, both before and after the bringing of this ejectment, for Bald Eagle Furnace, on the tract of land mentioned in the deed signed John Gloninger & Co., of the 1st June, 1812, in this special verdict before referred to. They further find that both parties did raise ore on said tract before the division and releases hereinbefore mentioned for Bald Eagle Furnace and Huntingdon Furnace; *but that the right in the Beck tract, which is in question, belonged to Huntingdon Furnace, and that Bald Eagle Furnace accounted* to Huntingdon Furnace for the ore taken from the said tract; and that the said tract of Beck on which the ore is raised is more than two miles from Huntingdon Furnace and the ground on which the said furnace stands.

"And the jury do further say, that they are ignorant in point of law upon which side they ought to find upon the foregoing facts and conveyances so found. That if, upon the whole matters, the court shall be of opinion that the issue is proved by the plaintiffs, they find accordingly for the plaintiffs, with six cents damages and six cents costs; but if the court are of a contrary opinion, that upon the facts so found and the conveyances the law is with the defendants, then the jury find for the defendants."

Deed referred to in special verdict from *John Gloninger & Co. to Daniel Beck, dated 1st June, 1812*, by which the said John Gloninger & Co. conveyed to the said Daniel Beck a tract of land situate in Warriors-mark Township, Huntingdon county, containing 476 acres, 14 perches, surveyed on a warrant to Robert Cooper, which deed contains the reservation referred to in the following words, to-wit:

"Reserving out of this grant unto the said Gloninger & Co., their heirs and assigns, all the timber, wood and ore, and mines of every kind on the said tract of land being, with the right, liberty and privilege of entering upon the said tract of land, or any part thereof, at such times as to them, or any of them, or to their manager or agent, shall seem expedient, with

workmen, wagons, carts and teams, for the purpose of cutting, coaling and taking away the wood, timber and coals, and of digging, raising and taking away the ore and mines, and to do and perform any other act, work, labor or thing on the same as may be deemed necessary and proper by them to carry the same into operation and effect."

17th August, 1835. *Deed of release* from John Lyon, Anthony Shorb and wife, David Stewart and wife, and William C. Stewart and wife, to Dr. Peter Shoenberger, referred to in special verdict.

"Whereas, on the 16th day of July, A. D. 1835, the said John Lyon, Anthony Shorb, David Stewart and William C. Stewart, and Dr. Peter Shoenberger, of the county of Allegheny and State of Pennsylvania aforesaid, were partners, engaged in the business of manufacturing iron, and *joint owners, in the proportions hereinafter stated*, of Huntingdon Furnace, Elizabeth Forge, Bald Eagle Furnace and the Tyrone Forges, *and of all the lands, tenements, hereditaments and appurtenances, and of the stock and property thereunto belonging;* that is to say, the said John Lyon, Anthony Shorb, David Stewart and William C. Stewart *were the owners of the one undivided half part of Huntingdon Furnace and Elizabeth Forge, and of all the lands, stock, credits and property, real, personal and mixed, thereunto attached or belonging;* and the said Dr. Peter Shoenberger was the owner of the other undivided half part of the same. And the said John Lyon, Anthony Shorb, David Stewart and William C. Stewart were also the owners of the two undivided third parts of Bald Eagle Furnace and the Tyrone Forges, and of all the lands, stock, credits, and property, real, personal or mixed, thereto attached or belonging; and the said Dr. Peter Shoenberger was the owner of the remaining third part of the said last mentioned establishments, and of the lands, stock, credits, and property, real, personal or mixed, thereunto belonging or in any wise appertaining.

"And whereas, on the said 16th day of July, aforesaid, the said parties above named dissolved the partnership existing between them by articles of agreement, executed by the said John Lyon, Anthony Shorb and David Stewart, contracting for themselves and William C. Stewart of the one part, and by

the said Dr. Peter Shoenberger of the other part, bearing date the said 16th day of July, aforesaid, and made an amicable partition and division of their joint-stock and partnership property, and covenanted and agreed to execute mutual releases to each other, according to the terms and provisions of the said articles of agreement, as by reference to said articles of agreement intended to be recorded, more fully and at large will appear.

"Now, know ye, that the said John Lyon, Anthony Shorb, and Elizabeth his wife, David Stewart and Sarah his wife, and the said William C. Stewart and Jane his wife, by their attorney in fact aforesaid, in consideration of the covenants in the said articles of agreement by the said John Lyon, Anthony Shorb, David Stewart and William C. Stewart to be observed and performed, and in compliance with the same, and in further consideration of the sum of one dollar, to them in hand paid, at or before the sealing and delivery of these presents, by the said Dr. Peter Shoenberger well and truly paid, the receipt whereof is hereby acknowledged, have granted, demised, released, and forever quit-claimed, and by these presents do fully and absolutely grant, remise, release and forever quit-claim unto the said Dr. Peter Shoenberger, and to his heirs, executors, administrators and assigns, all their, the said John Lyon, Anthony Shorb, David Stewart and William C. Stewart's, *one undivided moiety or half part of the above and before mentioned Huntingdon Furnace and Elizabeth Forge, and of all the lands, stock, partnership effects, credits and property, real, personal or mixed, thereunto attached or belonging*, and all other the estate, right, title, interest, property, claim and demand whatsoever of them, the said John Lyon, Anthony Shorb, and Elizabeth his wife, David Stewart, and Sarah his wife, and William C. Stewart, and Jane his wife, of, in, to, or out of the said Huntingdon Furnace and Elizabeth Forge, or of, in, to, or out of any of the lands (except as hereinafter excepted), stock, partnership effects, credits, or property, real, personal, or mixed, thereunto belonging or in any wise appertaining; which said lands and appurtenances, constituting the real estate, are as hereinafter described, that is to say, a tract of land situate in Franklin Township, in the county of Huntingdon, aforesaid," etc. (other tracts are

then described), and, amongst other things therein described, granting, remising, releasing, and forever quit-claiming unto the said Dr. Peter Shoenberger and his heirs and assigns, "also the *rights and privileges* reserved in and by a deed of conveyance from John Gloninger & Co. to Daniel Beck, bearing date the 1st June, 1812, and recorded, by which the said John Gloninger & Co. conveyed to the said Daniel Beck a tract of land, situate in Warrior's-mark Township, containing 476 acres, 14 perches, surveyed on a warrant to Robert Cooper, which deed contains a reservation as follows, to wit: reserving out of this grant, unto the said John Gloninger & Co., their heirs and assigns, all the timber, wood and ore mines of every kind on the said tract of land being, with the right, liberty, and privilege of entering upon the said tract of land, or any part thereof, at such times as to them, or any of them, or to their manager or agent, shall seem expedient, with workmen, wagons, carts, and teams for the purpose of cutting, coaling, and taking away the wood, timber and coals, and of digging, raising and taking away the ore and mines, and to do and perform any other act, work, labor, or thing on the same as may be deemed necessary and proper by them to carry the same into operation and effect"; with a note, at the bottom of said deed, that "the right to cut timber extends only to the original growth," etc., etc., "together with all and singular the buildings and improvements, barns, stables, out-houses, ways, woods, waters, water-courses, rights, liberties, privileges, hereditaments and appurtenances whatsoever, thereunto belonging, or in any wise appertaining, and the reversions and remainders, rents, issues and profits thereof: they, the said John Lyon, Anthony Shorb, David Stewart, and William C. Stewart, *nevertheless expressly reserving to themselves*, and to their heirs and assigns, *out of* the grant and release herein and hereby made, the full one undivided half part of all the iron ore which, at any time, may be found *on any of the lands now belonging to Huntingdon Furnace and Elizabeth Forge, as hereinbefore described, within not less* than the distance of two miles from said Huntingdon Furnace, (or from the ground on which said Huntingdon Furnace now stands,) for the use of Bald Eagle Furnace, or any other furnace which may hereafter be built at or near the place where said Bald

Eagle Furnace now stands, in the room and stead of said Bald Eagle Furnace, by the said John Lyon, Anthony Shorb, David Stewart, and William C. Stewart, their heirs and assigns; and they, the said John Lyon, Anthony Shorb, David Stewart and William C. Stewart, hereby further expressly reserving to themselves, and to their heirs and assigns, the right of free ingress, egress, and regress into, over, upon, and from said lands, (lying and being as aforesaid within not less than two miles from Huntingdon Furnace, or within the distance of not less than two miles from the ground on which said Huntingdon Furnace now stands) with workmen, wagons, carts, and teams, to take and carry away said iron ore, for the use aforesaid, at all times; and expressly further reserving to themselves, the said John Lyon, Anthony Shorb, David Stewart and William C. Stewart, their heirs and assigns, the right and privilege of digging for said ore, of mining in the most advantageous manner, and of excavating and subverting the soil of the said Dr. Peter Shoenberger, his heirs or assigns, at any place in the lands aforesaid, within not less than two miles as aforesaid from Huntingdon Furnace, for the purpose of taking the iron ore herein and hereby reserved by the said John Lyon, Anthony Shorb, David Stewart and William C. Stewart, to themselves, their heirs and assigns, for the use of Bald Eagle Furnace, or any other furnace which may hereafter be built by the said John Lyon, Anthony Shorb, David Stewart and William C. Stewart, their heirs or assigns, at or near the same place where Bald Eagle Furnace now stands, and in its stead or room; and expressly further reserving to themselves, the said John Lyon, Anthony Shorb, David Stewart and William C. Stewart, their heirs and assigns, the right of doing all acts, matters, and things necessary for the convenient enjoyment of the rights herein and hereby reserved, so as to interfere as little as practicable with the estate and interests hereby released and conveyed to the said Dr. Peter Shoenberger, his heirs and assigns; it being expressly understood that the other undivided half part of all the iron ore which may at any time be found on any of the lands hereinbefore described, and situate as aforesaid, within not less than two miles of Huntingdon Furnace, is to be for the use of the said Huntingdon Furnace, or any other furnace which may hereafter be built

by the said Dr. Peter Shoenberger, his heirs or assigns, at, or near the place where said Huntingdon Furnace now stands, in the room and stead of said Huntingdon Furnace. And it being further expressly understood, and it being the true understanding of the parties, that the said John Lyon, Anthony Shorb, David Stewart and William C. Stewart, their heirs and assigns, and the said Dr. Peter Shoenberger, his heirs and assigns, are to be held and considered to be tenants in common, in regard to the iron ore in and upon the land aforesaid, within not less than two miles as aforesaid from Huntingdon Furnace, in equal and undivided moieties as before stated (the reservation herein and hereby before expressed not to be construed in any manner to extend to any lands herein and hereby released, situate, and being within the distance of two miles from Huntingdon Furnace, or within the distance of two miles from the ground on which said Huntingdon Furnace now stands, or to any iron ore in or upon the same). It being, further, the true understanding and agreement of the parties to these presents, that if both parties, their heirs or assigns, should wish to exercise the right of raising and taking ore from the same bank or pit, on any of the lands aforesaid, within not less than two miles as aforesaid from Huntingdon Furnace, they are to pay an equal proportion of the expenses of opening the bank, and of raising the ore; and the ore, when raised, is to be equally divided in the proportions before stated; that is to say, in equal moieties between the said Dr. Peter Shoenberger, his heirs and assigns, on the one side, and the said John Lyon, Anthony Shorb, David Stewart and William C. Stewart, their heirs and assigns, on the other. And it is further the understanding of the parties that neither party is to be at liberty to take iron ore off of the said lands to which the reservations hereinbefore expressed extend, for more than one furnace, at any one time, without the consent of the other, their heirs or assigns."

1835, August 17th. Deed of release from Dr. Peter Shoenberger and Sarah, his wife, unto John Lyon, Anthony Shorb, David Stewart and William C. Stewart, in consideration of the covenants in certain articles of agreement between said parties, of all the estate, right, title and property of the said Dr. Peter Shoenberger and wife, of, in and to Bald Eagle Fur-

nace and Tyrone Forges, and the lands, rights and effects attached thereto (being the one third), reciting the before mentioned deed of release from John Lyon, Anthony Shorb, David Stewart and William C. Stewart, to the said Dr. Peter Shoenberger, of same date, of their right, title and interest of, in and to Huntingdon Furnace and Elizabeth Forge, and the lands, effects and property belonging and attached thereto; and that they had reserved to themselves the full undivided half part of all iron ore which at any time may be found on the lands now belonging to Huntingdon Furnace and Elizabeth Forge, etc., in the same words as are contained and before set forth in the deed of release before recited. And the said Dr. P. Shoenberger and Sarah his wife, in consideration of the covenants in the said articles of agreement, do grant and confirm unto the said John Lyon, Anthony Shorb, David Stewart and William C. Stewart, and their heirs and assigns, the right of free ingress, egress and regress, into, over, upon and from all and every the lands now belonging to Huntingdon Furnace and Elizabeth Forge, or either of them, as described in the deed of release aforesaid, of even date herewith, situate, lying, and being within not less than two miles from Huntingdon Furnace, or within the distance of not less than two miles from the ground on which said Huntingdon Furnace now stands, with their workmen, wagons, carts and teams, to mine and carry away one full undivided half part of all the iron ore which at any time may be found on any part of the lands aforesaid, situate as aforesaid, within not less than two miles from said Huntingdon Furnace, for the use of Bald Eagle Furnace, or any other furnace which may hereafter be built at or near the place where said Bald Eagle Furnace now stands, in the room and stead of said Bald Eagle Furnace, by the said John Lyon, Anthony Shorb, David Stewart and William C. Stewart, their heirs or assigns, hereby expressly confirming and recognizing the reservations and restrictions and qualifications in the deed of release before mentioned and expressed; but neither the reservations in the said deed of release mentioned, nor the grant and confirmation herein expressed, are to be construed to extend to any lands in the said deed of release mentioned and described, lying and being within two miles of Huntingdon Furnace, or within two miles of the ground on which said Huntingdon Furnace now stands.

The court below rendered a judgment for the defendants. The cause was argued in this court at May term, 1842, and held under advisement, and a re-argument directed; and it was again argued by

BELL, for plaintiffs in error.

MILES, for defendants in error.

The opinion of the court was delivered by GIBSON, C. J.

Dr. Peter Shoenberger, from whom the plaintiffs deduce their title, owned a moiety of Huntingdon Furnace, Sligo Forge, and the lands appurtenant, as well as a moiety of the ore reserved out of the grant of a tract of land by Gloninger & Co., under whom all parties claim, to one Beck; and the defendants owned a moiety. Dr. Shoenberger owned also a third of Bald Eagle Furnace, of the Tyrone Forges, and of the lands appurtenant, of which the defendants owned two thirds. The parties agreed to make partition of the whole, and to that end Dr. Shoenberger conveyed to the defendants his third of Bald Eagle Furnace, the Tyrone Forges, and the lands appurtenant; while the defendants conveyed to him their moiety of Huntingdon Furnace, Elizabeth Forge, and the *lands* appurtenant (specifying the particular tracts;) and also, by a separate and special clause, their moiety of the ore reserved out of the grant of Gloninger & Co. to Beck, in these words: "Also, the rights and privileges reserved in and by a deed of conveyance from John Gloninger & Co. to Daniel Beck, by which the said John Gloninger conveyed to the said Daniel Beck a tract of land, etc., which deed contains a reservation, as follows, to wit: 'Reserving out of this grant to the said John Gloninger & Co., their heirs and assigns, all the timber, wood, and ore mines of every kind on the said tract being, with the right, privilege, and liberty of entering on the said tract of land,'" etc., with a memorandum at the foot that the right to cut was limited to timber of the first growth. While the defendants thus specially conveyed their share of the ore reserved in Gloninger's grant to Beck, they reserved generally from their grant to

Dr. Shoenberger "the full undivided half part of all the iron ore which may at any time be found *on any* of the *land* now belonging to Huntingdon Furnace or Elizabeth Forge, as hereinafter described, within not less than the distance of two miles from said Huntingdon Furnace, for the use of Bald Eagle Furnace." Then followed the reservation of a right to enter, dig, and carry away, with a proviso that the other half should be for the use of Huntingdon Furnace. The Beck tract is distant more than two miles from Huntingdon Furnace; and the question is, whether the defendants' moiety of the ore in it, which they conveyed by a special clause, as the *rights* and *privileges* reserved by Gloninger, was taken back by the general reservation of the ore to be found on the lands then belonging to Huntingdon Furnace or Elizabeth Forge, or rather whether it passed at all.

The defendants insist that though it may have been ore in the contemplation of the parties, it was land in contemplation of the law; and they suppose that if they have established that, they have brought it within the words of the general reservation.

It is certainly true that a thing reserved remains as it was. A reservation, operating as it does by way of exception, keeps the thing from passing just as if there were no grant at all; so that, if this ore was land before the tract was granted to Beck, it was land afterward, and consequently corporeal; in which respect the reservation of it differed from the reservation of a thing issuing out of land, like a rent, which is no part of it. There is no inconsistency between the reservation of a rent and a grant of the land, because nothing is to be taken back which has passed by the deed. Of a grantor's power, however, to take back with one hand what he gives with the other, more will be said presently; but to speak to the question of intention, what matters it that the ore reserved in the grant to Beck was land in contemplation of law, if it was not land in the contemplation of Dr. Shoenberger and the defendants, or *the* land they intended to reserve by that description? It is scarce necessary to advert to the great rule that the construction be as near to the apparent intent as possible, and "that too much regard be not had to the nature and proper definition, signification, and acceptance of words and sen-

tences, to pervert the simple intention of the parties." (Touchstone, 86.) Neither is it necessary to advert to the rule that the meaning is to be collected, not from particular words but from the context; and not from particular parts of the instrument, but from all the parts of it together. These are cardinal principles, which come to the mind unbidden.

Is it possible, then, that the parties contemplated a reservation of ore by the name of land, out of what was itself ore, and out of what they had not granted as land, but as rights and privileges previously reserved in a deed to which they referred for a specific description of the thing, and in which it was called ore? If the defendants' share of it were supposed to fall within their general reservation as land, it would have been supposed to fall within the general terms of their grant as land; and a special clause, granting it by a particular designation of it, would have been unnecessary. In other words, if they had thought it land to be embraced by the general terms of their reservation, they would have thought it land to be embraced by the general terms of their grant. The right to a mine may be severed from the soil, as in *Doe* v. *Wood*, 2 Barn. & Ald. 724; and that the defendants thought the right had been severed in this case, though they knew nothing about the decision in that, is shown by the fact that they did not describe it as a part of the soil; and that they did not convey it as land, shows that they did not view it as land within the general clause of the reservation, which had regard to land, and nothing else. It would have been absurd to reserve the ore from a grant of land which, according to the defendants' argument, consisted entirely of ore; for the grant and the reservation could not have stood together.

But the reservation was of ore lying on land *then* belonging to Huntingdon Furnace or Elizabeth Forge; and why qualify it as to time, unless to restrict the generality of the words to land which was once appurtenant to that furnace or that forge, but which was so no longer? We can not choose but think that the qualification had for its object the exclusion of the ore in the Beck tract from the reservation, because it is not found that the parties owned other lands which had been detached from Huntingdon Furnace or Elizabeth Forge, and it does not appear that there was anything else for its opera-

tion. If the ore in the Beck tract is not excluded by implication, what else is? It is true that if it was land in the contemplation of the parties, it was land then belonging to Huntingdon Furnace, and the negative implied by the word "now" would be inapplicable to it; but to give that word effect, and every word in a deed must be made to operate where it may, it ought to be shown that it was intended for something else.

But the right to this particular ore had been severed from the land; and the restriction of the reservation to ore on land belonging to Huntingdon Furnace or Elizabeth Forge, was doubtless intended to exclude it. The popular distinction between ore and land seems to have been studiously preserved; else why speak of ore lying on land, if the ore itself was deemed to be land? To do so would be absurd.

Again, if the parties intended to retain their shares of this ore, why put it in the conveyance at all? They were joint tenants of it in equal proportions; and, according to the arguments, they are so still, the conveyance being so far a dead letter. Now, it is a rule, as we have said, that every part of a deed must be allowed to operate if it may; but, according to the defendants' interpretation, the mutual action and reaction of the grant and reservation are so nicely balanced that neither can operate, and the title remains where it was—an interpretation that was rejected by this court in *Baker* v. *McDowell*, 3 W. & S. 358, where a grant of a part of a mine was attempted to be neutralized in the same way. It is true that the timber growing on the Beck tract was reserved along with the ore, and that the defendants' grant might at one time have operated on it as one of the privileges conveyed; but the reservation was restricted to timber of the first growth, which in the usual course of things is cut off once in sixteen years to supply the coals necessary for a forge or a furnace; and this part of it had consequently become obsolete in the period of three-and-twenty years which intervened between the two conveyances.

But, whatever were the intention, the rule that a reservation which is as large as the grant is void, and the grant valid, would control it. A reservation, being an exception out of the thing granted, keeps the part reserved from passing; and, unless it were smaller than the thing granted, nothing would

pass, so that the grant would be void. But the law presumes that the grantor intended that his conveyance should take effect, and it gives effect to it in the only way it can, by disregarding the reservation. A valid reservation, therefore, must be the saving of a smaller thing out of a greater, or a particular out of a general; as a room out of a house, or timber out of a manor. The subject of it must be not only a thing not expressly granted, but an accessory which is not inseparable from its principle. Again, where it would destroy the entirety of the thing granted, it is void; as where the manorial court is excepted out of the grant of a manor, for there can be no manor without its court. So where it would destroy the grant altogether; for it has been held that a lease of all the lessor's lands in a particular place, except his manor, passes the manor if he has no other lands there; and that a lease of a house and shops, except the shops, passes the whole. Every saving which crosses the grant is, so far as it is repugnant, of no force; and it is repugnant wherever the thing must necessarily pass, in the first instance, to satisfy the words. Many more examples of this commonplace principle might be taken from Touchstone (p. 78), where authorities for them are quoted. They are illustrations of the rule already glanced at, that all the parts of a deed shall operate where they may, and that, where they may not, those shall be rejected which stand in the way of its operating at all.

Now, the saving out of the grant of this ore is just as large as the grant itself. It is true that the saving in the grant from Gloninger to Beck included "ore mines *of every kind*;" and that the subject was granted to Dr. Shoenberger in terms as large, while the reservation in the grant to the latter is of *iron* ore only. But the ore of no other metal was found in the region; and as the reservation was to benefit Gloninger, as a manufacturer of iron, the presumption is that it was to be not more extensive than the necessities of his business. The difference between the words of the two reservations, in the terms of the first, of which the subject was granted to Dr. Shoenberger, was evidently the accidental work of the scrivener. It is true, too, that those terms were large enough to carry the timber; but at the end of twenty-three years the presumption is that the first growth of it had been exhausted.

It would not differ the case if no such presumption were made; for the ore, being expressly granted by reference to a deed in which it was specifically enumerated, could not be reserved. The case is in principle that of the house and shops, in which the saving of the shops was held to cross the demise of the whole. Independently, then, of interpretation, and of actual or constructive intention, this saving is repugnant and void by force of a plain, rational and undoubted rule of the common law.

Judgment of the Common Pleas reversed, and judgment rendered by this court for the plaintiffs.

MUNN v. STONE ET AL.

(4 Cushing, 146. Supreme Judicial Court of Massachusetts, 1849.)

Reservation of right to quarry granite, assignable. A clause in a deed as follows: "reserving to myself the privilege of entering said tract, and taking and carrying away stone from" a certain portion of the tract containing a granite ledge, construed, not a reservation of a mere personal privilege, but of a right and interest in the use of the land, which the grantor might assign.

General reservation—Life estate. A reservation to the grantor generally, without words of enlargement or limitation, is a reservation for the period of the grantor's natural life.

This was an action of trespass to land, for taking and carrying away portions of a ledge of granite in land alleged to belong to the plaintiff. Whilst pending in the Court of Common Pleas, the action was referred to an arbitrator, who reported a statement of the facts, reserving the questions of law arising thereon, at the request of the parties, for the consideration of the court, and made his award accordingly. The Court of Common Pleas accepted the award, and entered judgment thereon for the plaintiff; and the defendants thereupon appealed to this court.

The plaintiff claimed title to the land in question in virtue of a deed with warranty, dated September 27, 1844, from Obed Severance, who derived title to the same by a deed dated Feb-

ruary 14, 1844, from Jonathan Lyman, whose title was not disputed. Both deeds included and purported to convey the land alleged to be trespassed upon.

The deed from Lyman to Severance contained the following reservation: "Reserving to myself the privilege of entering said tract and taking and carrying away stone from the northern part of said tract as far south from the northern end, as the woods now stand in said tract." The subject of this reservation was the granite ledge from which the defendants had taken portions.

In November, 1847, Lyman gave the defendants a writing duly executed, which purported to sell and convey, and so far as he possessed power, did sell and convey all the rights to the stone in the granite ledge, which he had reserved to himself by the clause above recited in his deed to Severance.

G. T. DAVIS, for the plaintiff.

D. AIKEN, for the defendants.

BY THE COURT.

We can not distinguish between the reservation of a right or privilege of entering on a particular, designated part of a tract conveyed, and carrying away stone, and a reservation of the use of a marble quarry, out of the land conveyed, for a limited time. Whether it is an exclusive use, or a use in common, may be a question; but it is the same in both cases. We think, therefore, that this case is substantially governed by that of *Farnum* v. *Platt*, 8 Pick. 339. The only difference is, that in the case cited, the use reserved was for a term of years; in this case it is a reservation to the grantor generally, which, being without words of limitation, is a right for his life. We are of opinion, therefore, that the reservation recited did not constitute a mere privilege to Lyman to take stone personally, but was a right and interest in the use of the ledge, which was assignable; and the defendants, having obtained a right of him, were not chargeable with the trespass complained of.

Report accepted, and judgment thereon for the defendant.

HOUSE ET AL. V. PALMER.

(9 Georgia, 497. Supreme Court, 1851.)

Construction. A condition, upon the performance of which a reservation depends, must be strictly performed by the grantor, and within the time limited.

[1] **Reservation of right to test for gold.** The vendor of land retaining the right to test it for gold within eighteen months, with the right to work it if found, must not only make the test within the time limited, but must also give notice to the grantee of his election to preserve the reservation.

[2] **Adverse possession after severance of the mineral title.** More than seven years' notorious peaceable and adverse use of gold mines, where the party has gone into possession under deed, will give a statutory right, notwithstanding the vendor's reservation of the exclusive privilege of working such mines.

In equity, in Lumpkin Superior Court. Decision by Judge JOHN H. LUMPKIN, March term, 1851.

Aaron Palmer, the defendant in error, filed his bill in Lumpkin Superior Court, setting forth the following facts: That in 1833 Lewis House, being the drawer and grantee of a lot of land in Lumpkin county, conveyed the same to one John McClure by a deed, in which was a reservation to himself of the gold on the premises and the right of digging therefor, on condition that he (House) should test the lot for gold within eighteen months, and have the right of digging if it should prove profitable; but if he should fail to test it in that time, his right to cease and be void. In 1837 McClure sold the lot to Palmer, the complainant, subject to the reservation in the former deed.

Complainant charged that no test had within his knowledge been made of the lot in the time limited; that he bought with the understanding that no test had been made; that he had afterward heard a report that it had been tested but had not proved profitable, but did not know whether it was true or not; that for more than seven years he had from time to time been mining on the land without interruption; that some

[1] *Monroe* v. *Bowen*, 26 Mich. 523; *Perkins* v. *Stockwell*, 131 Mass. 529.
[2] See 1 M. R. 240, notes.

time in 1849 or 1850 Matthew C. Halen entered on the land, under a lease from House executed about that time, and commenced mining for gold, and continued so to do. Whereupon complainant prayed an injunction against House and Halen, to forever restrain them from mining on said lot.

To this bill defendants filed a general demurrer, for want of equity, which was, on argument, overruled by the court; to which decision defendants excepted.

MARTIN, for plaintiff in error.

BROWN & HANSELL, for defendants.

By the Court, LUMPKIN, J., delivering the opinion.

This was a bill filed by Aaron Palmer to restrain Lewis House and Matthew C. Halen, his lessee, from digging gold on lot No. 501, in the 13th district and first section of what was originally Cherokee, now Lumpkin county. Lewis House was the drawer of the land, and he conveyed the same to one John McClure, in 1833, reserving to himself the right of digging gold on the premises, on condition that he should test the lot within eighteen months, and find it profitable; failing to do this his right was to cease and to be of no effect.

In 1837 McClure sold the land to Palmer, the complainant, subject to the same reservation. The bill charges that at the time this last conveyance was made, it was the understanding of the complainant that House had waived all his right under his deed to McClure, "by having failed to test the lot within eighteen months, according to the condition in his deed." It further charges that more than four years having elapsed from the date of House's sale to McClure, and House having made no pretension to work on the lot, or given notice to McClure of his purpose to do so, that he had good reason to believe that House had forever relinquished all his right in said lot, and that he bought with this belief. It further charges, "that it was not true that a test had been made in compliance with the requisition in the deed to McClure, or that notice had been given to the complainant that he found the mine profitable and intended to work it."

The complainant states, "that having purchased under these circumstances afterward, to wit: In 1840 he commenced operating on the lot for gold, believing and claiming that the gold as well as the land was rightfully his property; and that from that year down to a recent period, and for more than seven years he has at frequent intervals, and as constantly as he could spare his hands from other employment, worked for gold on said lot; during most or all of which time he has had on said lot his mining tools, utensils, troughs, etc., or some of them, claiming and holding the same independent of the right of all other persons, while House has not at any time during this period made any attempt to operate on said lot."

To this bill defendants filed a general demurrer for want of equity, which was, on argument, overruled by the court. And it is to reverse this decision that this writ of error is prosecuted.

It will be observed that it is not denied that the case made by the bill is a proper subject-matter of injunction. The controversy is one of title.

1. We take this to be the obvious meaning of the reservation in the deeds. House stipulated that in parting with the land he was to retain the right to the minerals, *provided*, he tested them within eighteen months, and was satisfied that it would be profitable to work them.

2. This condition then, was for his benefit, and imposed upon him a plain duty, failing to perform which, he forfeited the privilege which otherwise would have been permanently secured. The bill charges substantially that he neglected to test the mines within the year and a half limited, or to give notice that he had found them productive and intended working them.

His failure to make the test was of itself a forfeiture of the privilege. But we are further of the opinion that he should have given notice of the result. This was not a secret to be locked up in his own bosom and suffered to slumber there, or be published as future and more thorough experiments, the employment of new and improved machinery, or other circumstances might suggest. It was a thing to be done and declared within a fixed space or it was forever too late. Deeds are to be taken most strongly against him who is the agent or

contractor, inasmuch as the instinct of self-preservation will always make men sufficiently careful to protect themselves—*verba fortius accipiuntur contrà proferentem.* And it would be manifestly wrong to hold that McClure and Palmer were to be kept forever in doubt and uncertainty as to the determination of House. All who might subsequently buy the land had the right to know whether they took it with or without the burden. House's notice that he made the test was therefore indispensable, according to the statements in the bill then, which are admitted by the demurrer to be true. Palmer took the title, discharged from the incumbrance.

3. But suppose it were otherwise—if he went into possession *bona fide* under his deed, and worked the mine publicly, notoriously and uninterruptedly for about ten years, claiming them as his own and against all other persons whatever, we think he has acquired an indefeasible statutory title, and that he is thus doubly fortified against the aggressions of the adverse party.

BENSON v. THE MINERS' BANK.

(20 Pennsylvania State, 370. Supreme Court, 1853.)

Deed reserving all ore to third party owning but four fifths. A person seized of the title to the undivided two thirds of a tract of land, and one fifth of the stone and coal on the tract, the right to the other four fifths of the coal being in the heirs of S. P., sold his interest by deed "excepting and forever reserving the liberty and privilege for the heirs and representatives of S. P., deceased, to dig, take and haul away *all* the stone coal that is or may hereafter be found on the above described tract of land." It was *held*, that no part of the stone coal passed to the grantees under the said deed.

[1] **Where the words are clear,** there is no room for construction.

Error to the Common Pleas of Schuylkill County.

In a feigned issue between the Miners' Bank, of Pottsville,

[1] *Walker* v. *Tucker*, 8 M. R. 612.

as plaintiff, and Lot Benson, as defendant, a case was stated for the opinion of the court.

From the case stated it appeared that *Isaac Thomas*, before the 20th of June, 1796, was the owner of *the undivided half part* of a tract of 337 acres, 131 perches of land, called "Norway," then in Berks, now in Schuylkill county. By deed dated 20th June, 1796, Isaac Thomas, for the consideration of five shillings, conveyed to John Potts, Thomas Potts, Joseph Potts, Jr., David Potts, Jr., and Robert E. Hobart, heirs and devisees of Samuel Potts, their heirs and assigns, "*all stone or fossil coal* that may be found on the undivided *half part* of a body of 2,786 acres and 41 perches of land, and also all stone or fossil coal that may be found on the said 337 acres, 131 perches of land," etc.

On the 19th and 20th June, 1796, a partition of such lands was agreed on, and the other tenants in common conveyed to Isaac Thomas all their interest in a part of the said land containing 1,721 acres and 20 perches, and including the tract of 337 acres, 131 perches, called "Norway."

By deed dated 23d June, 1796, Isaac Thomas conveyed the undivided one third of the 1,721 acres, 20 perches, *including the* 337 acres, 131 perches, to *David Potts, Jr.*, his heirs and assigns, in fee, "saving and excepting, out of this grant, all fossil or stone coal, with the privilege to dig and erect conveniences heretofore granted to Thomas Potts and others, forever."

By another deed of same date (23d June, 1796,) Isaac Thomas conveyed to *Lewis Reese*, his heirs and assigns, one other *undivided third part* of the same 1,721 acres and 20 perches of land, *with an exception in the same terms as above.*

By deed dated 13th April, 1798, David Potts conveyed his undivided third of the 1,721 acres and 20 perches to *Benjamin Jacobs, subject to the privilege of digging for fossil or stone coal*, mentioned in the deed to him by Isaac Thomas.

Benjamin Jacobs died intestate, and by proceedings in partition, the interest which he left under the deed from Potts, became vested in *Lewis Reese.*

By deed, dated 4th November, 1811, Lewis Reese and wife conveyed *to Samuel Kepner and Andrew Kepner*, their heirs and assigns, with special warranty, the 337 acres and 131

perches of land called "Norway," "excepting and forever reserving the liberty and privilege for the heirs and representatives of Samuel Potts, deceased, to dig, take and haul away all the stone coal that is, or may hereafter be found on the above described tract of land."

The material question in the case was, whether any right to coal passed to Samuel and Andrew Kepner by such deed.

The property conveyed by Reese and wife to S. and A. Kepner became vested in the Miners' Bank of Pottsville, and in the Bank of Kentucky, the whole of such interests being represented by the Miners' Bank.

By deed dated 22d May, 1843, Lewis Reese and wife conveyed to Thomas Biddle and others, for the consideration of *five* dollars, all the estate, etc., of the said Lewis Reese, of, in and to the liberty and privilege to dig, take and haul away all the stone coal that is, or may hereafter be found on the said tract of land so excepted and reserved in the deed recited, which was the deed of 4th November, 1811, of Reese and wife to S. and A. Kepner. It also recited the exception and reservation as made in that deed to the Kepners, of the liberty and privilege for the heirs and representatives of Samuel Potts, deceased, to dig, take and haul away all the stone coal that is or may hereafter be found on the said tract of 333 acres and 14 perches.

By deed of 9th July, 1846, Biddle and others, for the same consideration, conveyed to *Lot Benson*, the interest conveyed to them by the deed of Reese of the 22d May, 1843.

It did not appear that Reese ever asserted any right to the coal by mining it, or by suit against any one who did mine it, or by conveyance, till the execution of the deed to Biddle and others in 1843.

It was also agreed that there had been no such user of the lands as to bar Reese, or Benson, claiming under him, from any right, if any, existing in Reese after the execution of the deed to S. and A. Kepner.

The mines had been worked, and about $200 of the rent was for distribution, to be paid to the person or persons having the title to the coal in question. The Miners' Bank claimed the money, averring that if Lewis Reese had by the deeds to him the title to the said coal, then his interest in it passed to

Samuel and Andrew Kepner by the deed of 4th November, 1811.

Lot Benson, the defendant, also claimed it, averring that Lewis Reese had the title to the one fifth of the coal when he conveyed it to S. and A. Kepner; and that in the deed from Reese to them, the one fifth of the coal was reserved and did not pass.

The judge below, in his charge, said that it was admitted that Lewis Reese, up to the time of his conveyance to the Kepners, owned *one fifth* of the coal under the land, and the heirs of Samuel Potts, *four fifths*.

The judge below was of opinion that the intention of the parties to a deed may be controlled by the words of the deed; but that when the words used do not conflict with the intention, the latter must govern. That in the deed by Reese to S. and A. Kepner, though the reservation was in general terms, reserving *all* the coal to the heirs of Potts, yet it was not to be supposed that Reese intended to reserve for those heirs a greater interest than they already had, which was to the extent of *four fifths* of it, and that it did not appear that those heirs ever claimed a greater interest. He considered that Reese did not, as alleged on the part of the defendant, reserve the *one fifth* for *himself*. That his deed to the Kepners did not indicate any such intention; that for thirty-two years he did not allege any such interest; and his deed in May, 1843, to Biddle and others, was for a trifling consideration. He decided that Reese, by the deed executed in 1811, divested himself of all interest in the coal in question, and that nothing passed by his deed in 1843.

November 15, 1851, judgment was rendered on the case stated *for the plaintiff*.

Error was assigned to the judgment.

E. O. PARRY and W. STRONG, for plaintiff in error.

C. LŒSER, for defendant in error.

The opinion of the court was delivered March 21st, by WOODWARD, J.

A deed of grant for a tract of land particularly described, but with a clause in these words, "excepting and forever reserving the liberties and privileges for the heirs and legal representatives of Samuel Potts, deceased, to dig, take and haul away *all* the stone coal that is or may hereafter be found on the above-described tract of land," would seem intended to be a conveyance to the grantee of the land, but of no part of the stone coal. Yet the deed of Lewis Reese to Andrew Kepner, of the 4th of November, 1811, with this comprehensive exception fully expressed therein, was construed to be a conveyance, not only of the land, but of one fifth of the stone coal on the tract.

At the date of this conveyance, four fifths of the coal were vested in the heirs and devisees of Samuel Potts, deceased, and one fifth in the grantor, Lewis Reese; and hence the court argued, that it was not supposable that Reese intended to reserve for those heirs a greater interest than they had, and therefore he must have intended to convey his one fifth to Kepner.

If at liberty to speculate about the intention of the grantor, we might ask why it is not as supposable that he intended to vest his fifth in the heirs of Samuel Potts, from one of whom he had received it, as in Kepner? Or, seeing that he used the word "representatives" as well as heirs, a word which the court seem to have overlooked, why may we not presume that by virtue of the mesne conveyances he regarded himself as a "representative" of Samuel Potts, and that his exception and reservation were intended to operate in favor of the heirs as to four fifths, and in favor of himself as to the other fifth of the coal? Either of these presumptions is more reasonable than that set up in favor of Kepner, because they are favored by the words of the deed, while the other is directly opposed to the language of the instrument. Had it been an absolute deed, without any exception whatever, it would have been a desperate assumption that he intended that his fifth of the coal should go to those heirs instead of his grantee; yet it would have conflicted no more directly with the terms of the conveyance than the assumption now made that he meant to convey a fifth to Kepner, when he says he reserves it all for the heirs and legal representatives of Potts.

But there is no room here for speculation. Conjectural intentions are not to be set up in opposition to express words in a deed. The law presumes that every man intends the legal consequences of his words. The parties to this deed knew, for they were bound to know, the legal effect of the words used, as well as the rules of construction applicable to them: *Baker* v. *McDowell*, 3 W. & Ser. 360. Where there is no obscurity of language, the intention of parties is only to be taken from the words of the deed: *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est.* And in such case no extraneous facts or circumstances can be admitted or received to alter or change the intention thus deduced: *Means* v. *The Presbyterian Church*, 3 W. & Ser. 312.

Then, by the plain words of this deed, all the coal being expressly reserved and excepted out of the grant, the instrument can not be so construed as to pass any part of it to the grantee without subverting every rule of interpretation found in the books. The exception was not necessary as notice of the outstanding four fifths, for the title was on record, and if Reese had intended to convey his interest in the coal, the grantee had notice that he could convey only one fifth. But if mere notice were intended, the exception would have read four fifths, and not "*all.*"

It is undoubtedly true, as was suggested in the argument, that careless or incompetent scriveners often introduce into deeds of conveyance clauses and exceptions which they find in the deeds under which the grantor holds, without considering the effect of their repetition; but this circumstance alters none of the rules of construction. In *Baker* v. *McDowell*, there was an instance of this sort. The heirs of Thomas Blair, holding a tract of land under a deed which reserved one half of the iron ore on it, made a conveyance to Patrick Hamilton of the tract, reserving to themselves one half of the iron ore in the same words that were contained in the former deed. The well understood intention of the parties was that the reservation in the two deeds should operate on the same interest, but this court, deducing the intention only from the words used, held that both moieties of ore had been reserved, and that Hamilton took none of it. Had this deed reserved all the ore, like Kepner's in this case, he would not probably have claimed any part of it.

It is not necessary to go into the distinctions between exceptions and reservations, nor to consider whether the words used in this deed would estop Reese or his alienees from claiming any part of the stone coal as against the heirs of Mr. Potts; it is sufficient for the purposes of this case that he conveyed no part of it to Kepner, and of course those claiming under him, have no interest in it.

The judgment is reversed, and judgment is entered in the case stated for the defendant, with costs.

COWAN ET AL. V. HARDEMAN ET AL.

(26 Texas, 217. Supreme Court, 1862.)

[1] **Construction of the Texas statute reserving minerals to the republic.** A patent was issued for a tract of land under act of June 3, 1837, of the Republic of Texas, having a *proviso* "that no lands granted by this government shall be located on salt springs, gold or silver mines, copper or lead, or other minerals." The tract patented contained a valuable saline. *Held*, that the act must be construed by its object rather than its letter. That the object was to reserve the salt springs and mines, but not to prohibit the survey and patenting of lands until their mineral character was ascertained. That the patent was valid, but did not operate to pass title to the saline. That by the act the mineral estate was severed from the surface and the right to enter and get the minerals remained with the reservation.

The right to minerals reserved carries with it the right to enter, dig and carry them away, and all other incidents necessary to getting them.

Appeal from Burnet. Tried below before the Hon. NAT. M. BURFORD.

This was an action of trespass to try title and for damages, brought by D. Hardeman, William P. Hardeman and William B. Coffee, against David C. Cowan, Gideon Cowan and James Alexander.

The land in controversy was a tract of six hundred and forty acres, to which the plaintiffs derived title by purchase from Peter Pauly, a colonist of Fisher and Miller's colony. The land was granted to plaintiffs as assignees of Pauly, on the 18th of September, 1855, pending this litigation, and they set

[1] *State* v. *Parker*, 61 Tex. 265; *Morton* v. *Nebraska*, 12 M. R. 451; *Edwards* v. *Darby*, 12 Wheat. 206; *Marvin* v. *Brewster Co.*, 13 M. R. 40.

up their patent by an amended petition. In their original petition they alleged that there was a valuable saline upon the land of which the defendants had wrongfully taken possession and from which they were manufacturing salt, to the damage of the plaintiffs.

The defendants demurred generally and answered with a general denial. The demurrer was overruled. At the trial the plaintiffs admitted that their vendor, Pauly, had never settled on the land in controversy. The defendant offered evidence to prove that the "saline" mentioned in the petition was a salt spring, but the court excluded the evidence.

The court charged that the plaintiff having read in evidence a patent for the land and the defendants failing to introduce any species of title, the jury were authorized to find for the plaintiff. There was a verdict and judgment for the plaintiffs; a new trial refused, and defendants appealed.

Among the errors assigned was the overruling of the demurrer to the petition, it appearing on the face of the petition that there was a salt spring upon the land, which brought the land within the prohibition of the proviso to the 4th section of the act of June 3, 1837. Other errors were assigned to the admission in evidence, against the objections of the defendants, of the certificate to Pauly and the patent thereon to the plaintiffs, his assignees, which, as contended, were void because Pauly never settled on the land, and because the laws authorizing the issuance of such certificate and patent were unconstitutional and void by reason of the ordinance attached to the constitution of 1846, concerning colonization contracts.

A. J. HAMILTON, for appellants.

J. A. & R. GREEN and HANCOCK & WEST, for appellees.

MOORE, J.

The main question for our decision in this case depends upon the construction that must be placed upon the proviso in the fourth section of the act for the relief of James Erwin and others, passed June 3, 1837, which reads as follows: "Provided that no lands granted by this government shall be located on salt springs, gold or silver mines, copper or lead, or other minerals, or any island of the republic."

By this provision of the statute it is contended, as we understand appellants' counsel, that the islands and all lands containing minerals were separated from the mass of the public domain, and were thereby withdrawn from individual appropriation by the location thereon of the land scrip issued by virtue of said act of June 3, 1837, or by any other character of certificate or claim to land. And that, it appearing from the petition filed by the appellees, who were plaintiffs in the court below, that there was "*a valuable saline*" upon the six hundred and forty acres of land, for which suit was brought, the patent, therefore, which was granted to appellees as the assignees of a certificate issued to a colonist of Fisher and Miller's colony, was absolutely null and void.

This proposition, if correct, must lead to startling and unexpected consequences, not less embarrassing to the public than subversive of the titles under which seven tenths of the lands granted by the government have been hitherto held. If all the lands in the State in which any minerals can be found were withdrawn from location, how much of the public domain was left subject to appropriation? A very superficial observation or knowledge of the country must convince us that the amount left subject to location would fall far short of satisfying the certificates and scrip heretofore issued by the State. Whose title would be secure? The homestead of one of the heroes of San Jacinto or Bexar, the seat of honest toil, and held by patent since the first organization of the land office, without the slightest suspicion as to the validity of his title, or that the land was of the least value except for its agricultural products, may to-morrow be found to have beneath its surface strata of coal or a mine of gold, and his title must consequently be held to be absolutely null and void; having been issued for land which the surveyor had no authority to survey, or the commissioner of the general land office to patent. If this is the true construction of the statute, the great mineral wealth of the State, of which we have so often justly boasted, and to which we have confidently looked as a source of future wealth and prosperity, would prove to be the means of untold evil, and no greater scourge could befall the State than a geological survey for the development of its mineral resources.

But if the patents are void because minerals are to be found within the lands granted, the patentee as well as the State may take advantage of it; and any one who can show that there are any minerals within the land described in his patent, may demand his certificate from the commissioner of the land office, and have it again located, with the utmost confidence that he will be able to vacate the second patent for the same reason, whenever he may feel inclined to do so.

But is this the correct construction of this statute? We can not agree that it is. If the law were clear, explicit and unambiguous in its terms, and susceptible of but the one interpretation, as appellants' counsel seemed to regard it, its consequences, if evil, could only be avoided by legislative interposition, and not by judicial action. But that is not the case; the language of the proviso is contradictory in itself. It declares that "no lands *granted* shall be located," etc. But if the land has been "granted," the location has already been consummated. And hence, if we look to the ordinary and usual import of the words and the grammatical construction of the sentence, we are left in doubt as to the true intent and meaning of the legislature. To give it the construction contended for by appellants' counsel, the proviso should be modified so as to read, "that no certificates or other claim to land granted," etc., "shall be located on salt springs," etc. But are we not as fully authorized, by the grammatical construction of the sentence and the object and spirit of it, to say nothing of the uniform and practical construction that has, from the date of its enactment to the present time, been placed upon it by all the departments of the government, to construe it as declaring that no lands granted shall vest title to any salt spring, gold or silver mines, etc.?

The words of the statute not being, as it is quaintly but forcibly expressed by Lord Coke, "plain without any scruple, and absolute without any saving," it becomes necessary, to ascertain its true intent and meaning, that we should resort to the well established rules of statutory construction as our guide; and these require that we should seek to ascertain and give effect to the *thought which the legislature intended to express: Newell* v. *The People*, 7 N. Y. 97. What object had the legislature in view by the enactment of the proviso

in question? It was not, surely, to prohibit the surveying and patenting of any part of the public domain until the impossible and never attempted task should be performed by the legislature, of ascertaining and designating the mineral lands. Neither could they have intended to leave it as a matter of doubt and uncertainty with the surveyors and commissioner what land they should survey and patent, nor, after a patent had been granted, that no one should be able to say that it might not at some future day be shown to be void by the discovery of a mine, or mineral there hidden within the bowels of the earth.

The object and purpose of the legislature was simply to reserve to the public the islands and salt springs, gold and silver mines, copper and lead and other minerals, as corporeal hereditaments out of the public domain; and thus, while the mineral resources of the country that were then known to exist, or that might afterward be developed, were thereby secured to the government, no embarrassment was placed in the way of the citizen in acquiring the fee in the quantum of land to which his certificate or scrip entitled him. It is a well established doctrine from the earliest days of the common law, that the right to the minerals thus reserved, carries with it the right to enter, dig and carry them away, and all other such incidents thereto as are necessary to be used for getting and enjoying them: *The Queen* v. *Earl of Northumberland*, Plow. 310, 336; *Earl of Cardigan* v. *Armitage*, 2 Barn. & Cres. 197. And this is also the civil law: Rockwell's Spanish and Mexican Law, 49, 53, 83.

Nor does the reservation of its minerals and corporeal hereditaments out of granted lands create any unusual or novel estate. It is a doctrine as old as the common law that all royal mines, that is to say, those of gold or silver, throughout the kingdom, belong to the sovereign, and it is said, that though the king grant lands in which mines are, and all mines in them, yet royal mines will not pass by so general a description: Plow. 336. And we think it is evident that the legislature intended to do nothing more in this statute than to secure by an express reservation the same right to all minerals, when it granted land, that was by the common law impliedly reserved to the king as to royal mines. Nor can it be urged that this

construction militates against the express words of the law, which forbids the location of land, and that thereby we must understand that something more was intended to have been reserved than the corporeal hereditament of the minerals; for it must be remembered that this character of hereditaments are real estate. It is said in Rockwell's Spanish and Mexican Law, 580, that "a property may be acquired in mines which will be quite independent of the property in the lands in which they are situated. In this condition the minerals, of whatever character they may be, will, of course, still form parts of the land itself, and will constitute land in strictly legal acceptation."

It is also insisted that the patent to appellees is void because the statute under which it was issued was unconstitutional, having been passed in violation of the true intent and meaning of the ordinance with reference to colony contracts, attached to the constitution. The patent was granted by virtue of a certificate issued to a colonist of Fisher and Miller's colony. But it is said that the law granting the certificate was a law for the relief of the colonist; and that the ordinance forbade the granting of relief to either the contractors or the colonists unless the latter were actual settlers within the colony.

We do not think this position can be sustained. While the ordinance expressly declares that no relief shall be granted to the contractors, it provides that all actual settlers shall be entitled to their quantity of land. This certainly could not, by implication, be held to prohibit the legislature from granting a part of the public domain to such colonists as had not become actually settlers within the colony, equally with any other citizens who might be made the recipients of its bounty. But this point has been clearly, and we think correctly, settled by the case of *Causici* v. *La Coste*, 20 Tex. 269; and it is therefore unnecessary to dwell further upon it.

We will say in conclusion, that although we have discussed the question presented by appellants' counsel upon the hypothesis assumed by them, that the proviso to the fourth section of the act of June 3, 1837, was intended by the legislature as a rule of universal application to grants by the State, we, as an individual member of the court, think, however, it may

well be questioned if its true construction does not limit it to the grants made by the law in which it is contained.

There is no error in the judgment, and it is therefore affirmed.

WHEELER, C. J.—The case of *The State* v. *Delesdenier*, 7 Tex. 102, the proviso of the act of June 3, 1837, (Hart. Dig., Art. 1810,) which has been brought into discussion in this case, was considered by the court as the declaration of a general principle applicable to all grants by the State. As such I think it was intended by the legislature; not as the adoption of a new principle in the law of the State, but as declaratory of the existing law. As the object of the act was to discharge a debt contracted by the government, by the sale of scrip, which might be supposed to possess peculiar merits, and to operate, in so far as the holders of this scrip were concerned, a repeal of the laws creating reservations of islands, salt springs, etc., the proviso was introduced, out of abundant caution, to guard against the implication that such repeal was intended. It was intended as declaratory of the existing law in its application especially to the scrip for which they were providing.

The legislation of the congress of the republic affords other evidences of the solicitude of the legislature to guard the interest of the State in her islands, salt springs and minerals. There is a similar instance of the insertion of a provision reserving the islands from private appropriation, in the joint resolution of the 10th of December, 1836, (Hart. Dig., Art. 1779,) authorizing the president to negotiate a loan, and providing for the issuing of land scrip for the purpose. And in the act of the 20th of January, 1840, (Hart. Dig., Art. 127,) "To adopt the common law," and "repeal certain Mexican laws," etc., the repealing section expressly excepts from its operation "such laws as relate to the reservation of islands, and also of salt lakes, licks and salt springs, mines and minerals of every description;" manifesting a settled policy and purpose, on the part of the legislature, to protect the interests of the State in the enumerated objects, and to guard against their appropriation to the purposes of private speculation.

We hold that the patent is not absolutely and necessarily

void because there is found to be a salt spring or minerals upon the land embraced within the grant. And not being void it can not be impeached and avoided by a mere intruder. In so far as it concerns the use, it may, however, be avoided in part or in whole by the State in the exercise of its reserved right in the salt spring or minerals embraced within it. The State must have the easement of going upon the land for this purpose; and if to the full enjoyment of the right of the State it should become necessary to use the whole of the land, timber and water upon the tract, the right of the State to an easement to that extent can not, I apprehend, be questioned.

Judgment affirmed.

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[1] STOCKBRIDGE IRON CO. v. HUDSON IRON CO. HUDSON IRON CO. v. STOCKBRIDGE IRON CO.

(107 Massachusetts, 290. Supreme Court, 1871.)

[2] **Reformation of deed—Mistake must be proved beyond reasonable doubt.** Where land was conveyed reserving ore, but it was asserted that the parties had agreed on a reservation of the ore for certain furnaces only, and that it had been otherwise written by mistake: *Held*, that a court of equity could relieve such a mistake, and reform the deed; but the fact not being admitted, an issue of fact was, in the discretion of the court, properly submitted to the jury, with an instruction that such mistake must be proved beyond a reasonable doubt.

Proof beyond a reasonable doubt implies that degree of proof which men would act upon in the most important affairs of life and such as would satisfy their judgments and consciences of the fact to be proved.

Practice on submitting issues to jury in equity cases, stated.

[3] **Reservation distinguished from exception.** A deed reserving to the grantor "the right of mining on the above granted premises for the use of said company" an amount of ore not exceeding 7,500 tons annually at a rate of 37½ cents per ton, including all the facilities needful for doing the same, construed to contain a reservation as distinguished from an exception.

Idem—Incidents of reservation—Grantee not excluded—Statute of Frauds. Such reservation saves to the grantor no title to the land, or to the ore before it is mined or separated from the land; it does not restrict the grantee from mining at the same time, even to the exhaustion of the ore, and is not within the Statute of Frauds.

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[1] *Same* v. *Same*, 102 Mass. 45; *Stockbridge Co.* v. *Cone Iron Works*, 6 M. R. 317.

[2] *Whitsett* v. *Kershow*, 4 Colo. 419.

[3] *Sloan* v. *Lawrence Co.*, 5 M. R. 659.

Assignment of reservation. A right reserved in a deed to mine ore is assignable by the corporation making the deed, and such right is not subject to limitation or suspension by extrinsic evidence that the corporation was chartered to manufacture iron only in certain furnaces, and work mines only for its own use, and that at the time of the deed it expected to discontinue business.

Excusable delay is not laches. The delay of a party to a deed reserving ore, to bring suit to reform a mistake in the reservation, when the delay was based on his construction of the contract which had been originally assented to by the other party, is not *laches*.

The first suit was a bill in equity, filed December 5, 1868, by the Stockbridge Iron Company, a corporation chartered by this Commonwealth, alleging that on July 20, 1849, said company was seized and possessed of a tract of land containing beds of iron ore, in West Stockbridge, and on that day conveyed it to the Hudson Iron Company, a corporation established under the laws of New York, its successors and assigns, by a deed containing the following clause: "And further reserving to the Stockbridge Iron Company the right of mining on the above granted premises, for the use of said company, an amount of ore not exceeding seven thousand five hundred tons annually, at a duty of thirty-seven and a half cents per ton, including all the facilities needful for doing the same;" that under this clause the Stockbridge Iron Company, its successors and assigns, has a perpetual right to mine and carry away ore from the land, to the extent and upon the terms so provided, and the Hudson Iron Company is bound to refrain from mining and carrying away ore from the land to any extent, or in any manner which shall interfere with the said perpetual right; but that the Hudson Iron Company now denies the said right, and refuses to permit the Stockbridge Iron Company, or its assigns, to exercise it, and is mining and carrying away ore to an extent and in a manner calculated to defeat it; wherefore the bill prayed for a declaration by the court of the respective rights of the parties under the deed, and for protection of the right of the Stockbridge Iron Company by injunction and otherwise.

By a copy of the deed, which was annexed to the bill, it appeared that, immediately following the granting clauses and preceding the clause in question, was the following clause: "Excepting, however, from this conveyance, and reserving one

piece of land two rods square for a family burial ground, in the southwest corner of the garden on the premises, with a right to pass and repass, on all proper occasions, from the road to said burial ground, that same reservation being made in the prior deeds by which this property has been conveyed."

The answer admitted seizin and possession of the land by the Stockbridge Iron Company on July 20, 1849, and its execution of the deed with the clauses above quoted; and further alleged as follows:

"At the time of the conveyance to the Hudson Iron Company by the Stockbridge Iron Company, the latter company was taking ore from the premises and manufacturing the same in its furnaces in Stockbridge, under the provisions of its charter, granted by this Commonwealth by the Statute of 1841, c. 19.[1] Pending the negotiations for the purchase of the premises by the Hudson Iron Company, it was proposed by the Stockbridge Iron Company to reserve to itself the right to mine and take sufficient ore for the use of its furnaces at Stockbridge. This proposition was strongly objected to by the Hudson Iron Company; but it being represented to the Hudson Iron Company by the Stockbridge Iron Company, that on account of the cost of procuring charcoal, or of bringing anthracite coal to its furnaces, iron could not be profitably made at Stockbridge, and therefore the Stockbridge Iron Company would use the ore under the reserved right for but a few years at most, the Hudson Iron Company finally gave its assent to receive the deed, reserving the ore for the use of the Stockbridge Iron Company in its furnaces at Stockbridge. All parties, the Stockbridge Iron Company and the Hudson Iron Company, and the directors and trustees of each, alike understood and intended that the right reserved was to be a right to mine and take so much ore as should be required for the actual use and supply of the furnaces of the Stockbridge Iron Company at Stockbridge, and that

[1] By the Statute of 1841, c. 19, the Stockbridge Iron Company was incorporated "for the purpose of manufacturing pig, cast and bar iron in the town of Stockbridge," and authorized to hold, "for the purpose aforesaid, real estate to the amount of seventy-five thousand dollars, and the whole capital stock of said company shall not exceed one hundred and fifty thousand dollars."

only ; and that such use was to be in accordance with represented wants by said company. The deed to the Hudson Iron Company, and the reservation therein, were supposed, and were designed, to carry out this understanding and intention of all parties. The annual production of the Stockbridge Iron Company's furnaces, when in blast, being about three thousand tons of pig iron, and the usual estimate being two tons and a half of ore to one ton of pig iron, the mining right reserved was limited to seventy-five hundred tons annually, at a royalty of thirty-seven and a half cents per ton, the actual value of the ore at the time. The deed was drawn by a director of the Stockbridge Iron Company. When first handed to the agent of the Hudson Iron Company, he objected that it should be made more explicit, and should be prepared by a lawyer; but he finally received it, the parties representing the Stockbridge Iron Company stating that there was but one Stockbridge Iron Company, and they could not use the ore in any way but in their own furnaces. The deed was not actually executed and delivered till August 28, 1849.

"Immediately after receiving the deed, the Hudson Iron Company took possession of the premises, and began to prosecute, and has ever since prosecuted, thorough, extensive and scientific mining operations there.

"The Stockbridge Iron Company, on the other hand, after its deed to the Hudson Iron Company, did not until very recently, and until it procured an amendment of its charter by the Statute of 1864, c. 291[1] (of the passage of which act the Hudson Iron Company had no notice), mine or attempt to mine on the premises, and until such recent period supposed, as is believed, that in accordance with the original intent of the parties, and their true, legal and equitable rights, it had long since ceased to have any claim to take ore under and by force of the reservation in said deed.

[1] By the Statute of 1864, c. 291, the Stockbridge Iron Company was "authorized to mine ore, for manufacture or sale, on any land owned by said corporation or on which it has or may acquire an interest;" "to dispose of such lands or any mining rights of said corporation therein, by sale, lease or otherwise;" and "to establish works for the manufacture of iron or steel at any such places, in the county of Berkshire, or on the banks of the Hudson river as the stockholders may elect and determine."

"Late in the year 1855, or early in the year 1856, the Stockbridge Iron Company ceased to manufacture iron altogether, and in 1860 sold its furnaces. From the time the Stockbridge Iron Company ceased to make iron, no claim to take ore was made under the reservation in the deed, till 1864. Such claim was then asserted in a letter of the treasurer of said company to the Hudson Iron Company, but was at once and positively denied by the latter company. In 1865 the Stockbridge Iron Company took from the premises a trifling quantity of ore. But none of any consequence was taken, and there was no attempt to practically avail itself of the pretended right asserted in the above mentioned letter of its treasurer, of 1864, prior to 1867."

The answer finally alleged, "upon the said deed and reservation, and upon the facts hereinbefore set forth:"

"1. That under the said reservation there was reserved to the Stockbridge Iron Company for the sole use of said company in its furnaces at Stockbridge, and for no other use or purpose whatever, the right to mine and take so much ore on and from the premises as should be actually required for and used in said furnaces, not exceeding seventy-five hundred tons annually; and that, when the Stockbridge Iron Company stopped business and sold out its furnaces, all rights under said reservation ceased and were extinguished.

"2. That the clear intent and purpose of all parties to said deed and reservation being to reserve a right to take ore for the exclusive use of the Stockbridge Iron Company in its own furnaces at Stockbridge and not otherwise, a court of equity will not lend its aid to defeat such intent and purpose, but will leave the plaintiffs to their remedy at law.

"3. That the Stockbridge Iron Company having for a period of more than fifteen years, neither practically exercised nor claimed any rights under said reservation, and having during that period always recognized the rights of the parties under said reservation to be the same as they were originally intended to be, are now estopped to deny that these rights are different or otherwise, have been guilty of gross *laches*, and have lost all claim to equitable relief by virtue of their pretended claim, if any they ever had.

"4. That upon any construction of said reservation, the

right of the Hudson Iron Company in the premises and to the ore therein is paramount, and any right of the Stockbridge Iron Company, or any party claiming through or under it, must be exercised in subordination thereto; that the said reservation imposes no limit or restriction upon the extent of the mining operations of the Hudson Iron Company, nor upon the quantity of ore it may mine; that it confers no right of interfering with, or in any way embarrassing the mining operations of the Hudson Iron Company, and no right to use its mining facilities; and that, on the contrary, any mining operations of the Stockbridge Iron Company, or of any party claiming under it, must be so conducted as to in no way impede or disturb the existing works and operations of the Hudson Iron Company, and without its consent can not be carried on by means of the mining facilities prepared for the sole use of the Hudson Iron Company, and at its sole expense."

The Stockbridge Iron Company filed a general replication on April 5, 1869.

The second suit was a cross-bill filed by the Hudson Iron Company, March 1, 1869, in which, after making the same allegations of fact as were contained in the answer to the original bill and are above quoted, it was further alleged that, by the terms of the deed and the reservation therein, the Stockbridge Iron Company was entitled to mine or take ore from the premises to be used only in its own furnaces at Stockbridge; and that, if by said terms it was legally entitled to transfer to purchasers or assigns any right to mine and take ore, or was legally entitled to mine or take ore for sale, or to be used in any other manner than in its own furnaces at Stockbridge, "the language of said reservation was inserted in said deed by the mutual mistake of all parties thereto, and defeats the intention of all said parties." The prayer was for a decree dismissing the original bill filed by the Stockbridge Iron Company, for an injunction, for a reformation of the deed so as to conform to the true intent of the parties, and for general relief.

The Stockbridge Iron Company, in its answer, among other things, denied that pending the negotiations it proposed to reserve to itself only the right to mine, and take sufficient ore

for the use of its said furnaces; or that it represented, or in any manner suggested to the Hudson Iron Company, that for the reasons stated in the cross-bill, or for any other reason, iron could not profitably be made at Stockbridge, or that the Stockbridge Iron Company would use the ore under its reserved right but for a few years at most; or that the Hudson Iron Company received the deed with the understanding that the ore reserved therein was to be used by the Stockbridge Iron Company only in its furnaces at Stockbridge; or that the Stockbridge Iron Company, or its directors, or the Hudson Iron Company, or its trustees, ever understood or intended that the right to mine, reserved in the deed, was restricted to the supply of the furnaces of the Stockbridge Iron Company, as in said bill alleged; or that the deed to the Hudson Iron Company and the reservation therein, were supposed or designed by any of the parties to effect such a restriction; and alleged that on the contrary, "it was the design and intent of these defendants, and of the plaintiffs, that the right in said deed reserved should be of a vendible, alienable, transmissible right, to be exercised and enjoyed at all places and under all circumstances which the interests of these defendants, or their grantees or assigns, might make desirable." It also denied that the extent of the right to mine, reserved in the deed, was in any manner graduated or fixed by or in reference to the quantity of ore then being used by the Stockbridge Iron Company at its furnaces; alleged that without inspection of the deed the defendants could not state by whom it was drawn, but denied the allegations of the bill as to any objections to the deed made by the agent of the Hudson Iron Company, or that it was finally received by him, by reason of the alleged representations of the parties representing the Stockbridge Iron Company, or that any such representations were made; admitted that the deed was delivered on or about August 28, 1849, but alleged that it was executed and placed in the hands of the Hudson Iron Company for examination about ten days before it was delivered; and further denied "that the language of the reservation in said deed contained was inserted in said deed by the mutual mistake of all or any of the parties thereto, or that the same defeats the intention of the parties to said deed, or any of them, or that the Hudson Iron Com-

pany is entitled to have said deed in any manner reformed, or that any facts exist which will in any manner, in law or equity, warrant or authorize any reformation thereof." Afterward, by leave of court, the answer was amended by setting up the Statute of Frauds, and on March 25, 1871, subject to the objection of the Hudson Iron Company and the revision of the full court, by alleging such *laches* on the part of the Hudson Iron Company, as to debar it from any reformation of the deed.

The Hudson Iron Company filed a general replication on June 29, 1869.

In January, 1870, after the decision reported in 102 Mass. 45, the following issue for a jury was framed by the court in the second suit:

First issue. "Did both parties intend to insert in the deed, which was delivered by the Stockbridge Iron Company to the Hudson Iron Company on the twenty-eighth day of August, in the year eighteen hundred and forty-nine, a clause by which the right therein reserved to the Stockbridge Iron Company, to mine and take ore from the premises, should be limited and restricted to the use and supply of its furnaces in Stockbridge, and was in no event to exceed seven thousand five hundred tons annually, and was such clause omitted by the mistake of both the parties?"

At the hearing at which this issue was framed, the Hudson Iron Company moved to include in the order the following additional issue; and the question whether the motion should be allowed was postponed for the determination of the judge at the jury trial.

Second issue. "Was it the understanding, intent and agreement of both the Stockbridge Iron Company and the Hudson Iron Company that, by the contract of purchase and sale between the parties of the lands and ore-bed, the reservation to the Stockbridge Iron Company of the right to take seven thousand five hundred tons of ore annually at thirty-seven and a half cents per ton, was limited and restricted to the use and supply of the Stockbridge Iron Company's furnaces at Stockbridge, and was the deed delivered by the Stockbridge Iron Company and accepted by the Hudson Iron Company in the belief and with the understanding that the deed gave legal effect to such understanding, intent and agreement?"

The trial was had at May term, 1871, before Gray, J., who made a report thereof, of which the following are the material parts:

"It was ruled by the presiding judge that the right reserved to the Stockbridge Iron Company in the deed was not limited to ore to be used in its own furnaces, and might be assigned by it to any other party. This ruling was excepted to by the Hudson Iron Company, and the question of its correctness is reported for the determination of the full court.

"The Stockbridge Iron Company objected to the submission of the second issue to the jury; and contended that a finding of this issue in the affirmative, if the first issue should be answered in the negative, would not warrant a reforming of the deed. But both issues were submitted to the jury, reserving the question of the effect of any finding thereon for the determination of the full court."

The report then set forth the evidence introduced by both parties, and continued as follows:

"At the close of the whole evidence, the Stockbridge Iron Company contended that it appeared thereby that the parties had agreed to deliver and accept the deed in its present form, after it had been a subject of discussion between them which of the constructions thereof, now contended for by the parties respectively, was the true one; and that therefore a finding in favor of the Hudson Iron Company upon the second issue would not warrant a decree in its favor, and there was nothing to be submitted to the jury upon that issue. But the judge refused so to rule as a matter of law, and before the beginning of the closing argument for either party, he informed the counsel that he should submit to the jury the following:

Third issue. "Was the deed of the land and ore-bed delivered by the Stockbridge Iron Company, and accepted by the Hudson Iron Company, with the mutual intention and understanding that it should be and was in its present form, after the question had been raised and discussed between the parties whether the reservation to the Stockbridge Iron Company was limited by the terms in which it was expressed in the deed, to ore to be used at its own furnaces?"

"The Hudson Iron Company objected and excepted to the submission of the third issue to the jury, but did not offer or ask time to procure any further evidence.

"The Hudson Iron Company contended that the burden of proof upon the issues framed on its motion was the same as in civil actions. But the jury were instructed that the ordinary rule of evidence in civil actions, that a fact must be proved by a preponderance of evidence, did not apply to such a case as this; that the proof that both parties intended to have the precise agreement between them inserted in the deed, and omitted to do so by mistake, must be made beyond a reasonable doubt, and so as to overcome the strong presumption arising from their signatures and seals that the contrary was the fact; and that in this case proof beyond a reasonable doubt, was such a degree of proof as the jury would act upon in the most important affairs of life, and as would satisfy their judgments and consciences of the fact to be proved.

"The judge then proceeded to give instructions to the jury upon the law applicable to the first, second and third issues successively, to which no exception was taken. In these instructions the jury were told that in order to find for the Hudson Iron Company on the first issue, they must be satisfied that a clause had been omitted which was intended to be inserted; but that the second issue was broader, and covered a misunderstanding of the legal effect of the words used in the deed.

"No specific instruction was given or asked for as to the burden of proof on the third issue; nor was the judge's attention called, nor any exception alleged, to the omission so to do, and it was therefore not deemed by him to be open to exception, and he refused to allow such an exception first alleged after verdict.

"The jury answered the first issue in the negative, and the third in the affirmative, and failed to agree upon the second.

"The Hudson Iron Company, after the return and affirmance of the verdict, moved for a new trial, because of the rulings upon the construction of the reservation in the deed in its present form, upon the burden of proof, and the submission of the third issue to the jury at all, and because the finding of the jury upon this issue was against evidence and the weight of evidence; but did not offer any new evidence upon this motion. The motion was overruled and the ques-

tions of law presented by this report are reserved for the determination of the full court, who will make such order or decree in the cause as justice and equity may require. The question of *laches* in applying for a reforming of the deed has not been heard or tried, either by a single justice or by a jury."

In vacation after September term, 1871, a master was appointed to find and report the facts as to any *laches* of the Hudson Iron Company in bringing the cross-bill, and also as to any defense thereto by reason of any acts, conduct or claims of the Stockbridge Iron Company.

On December 26, 1871, the original suit of the Stockbridge Iron Company against the Hudson Iron Company was referred to the same master "to report any evidence either party may desire to submit as to the issues made by the bill and answer, and as to the understanding and agreement under which the deed and reservation in said bill set forth were made and accepted, and especially any evidence of the practical construction put by the parties upon said deed and reservation." At the time of this reference the Hudson Iron Company moved that the second issue, submitted to and not decided by the jury upon the cross-bill, should be submitted to a jury upon the original bill, and that, until a finding thereon, the original bill should not be heard by the court or referred to a master; but Gray, J., overruled the motion, reserving his ruling thereon by request of the Hudson Iron Company, for the revision of the full court.

Upon the coming in of the two reports of the master, both cases were heard by Gray, J., and together with the facts and rulings theretofore made and reported upon the cross-bill, were reserved for the decision of the full court. The Hudson Iron Company objected to the reservation upon the same ground (of the want of a finding upon the second issue) on which it had objected to the reference of the original suit to the master. Upon this reservation the cases were argued together at Boston in January, 1872, before all the judges but Colt, J.

S. BARTLETT, for the Stockbridge Iron Company.

B. R. CURTIS and B. F. THOMAS (T. P. PINGREE, J. M.

BARKER and R. OLNEY with them,) for the Hudson Iron Company.

WELLS, J.

The verdict upon the first issue defeats the position of the plaintiff in the cross-bill, so far as it rests upon the ground of an omission to insert in the deed any clause or provision agreed upon or intended to be inserted. The only question now before us, relating to that issue, is of the correctness of the instruction to the jury, "that the ordinary rule of evidence in civil actions, that a fact must be proved by a preponderance of evidence, did not apply to such a case as this; that the proof that both parties intended to have the precise agreement between them inserted in the deed, and omitted to do so by mistake, must be made beyond a reasonable doubt, and so as to overcome the strong presumption arising from their signatures and seals that the contrary was the fact; and that in this case proof beyond a reasonable doubt was such a degree of proof as the jury would act upon in the most important affairs of life, and as would satisfy their judgments and consciences of the fact to be proved."

This is in precise accordance with the rule as stated in the opinion of the court upon the former hearing of this case. (102 Mass. 45.) That statement was not *obiter dictum*, as it is now contended on the part of the plaintiff. It was involved in the question whether to submit the issue to a jury, which was a question of judicial discretion. In order to determine it, the court were necessarily led to consider whether, and in what mode, the verdict of a jury could be made an equivalent for that completeness of proof which is required in all such cases as the foundation of judicial interference in equity. It has always been held in courts of chancery, that in order to reform a written contract, and make it conform to a variant oral agreement, the proofs must be full, clear and decisive; free from doubt or uncertainty; such as entirely to satisfy the conscience of the chancellor. This well established and salutary principle constitutes the difficulty of submitting such cases to a jury, the office of whose verdict is to inform and satisfy the conscience of the court. A verdict rendered upon

mere preponderance of evidence would not do this. In order that a verdict, in cases of this nature, may answer its legitimate purpose, we know no better or safer rule than that laid down at the trial.

At the trial, upon motion of the plaintiff in the cross-bill, and against objection by the defendant, a second issue was allowed to be submitted to the jury. This issue presented in substance the claim of the plaintiff that, at the time of the delivery of the deed, both parties alike understood that the legal effect of its terms, as written, was to restrict the mining rights of the grantor to the supply of its furnaces at Stockbridge; and that such was in fact the real agreement upon which the deed was given and accepted.

The jury failed to agree upon this issue, and one question to be decided is, whether the court can proceed to a decree until a verdict has been reached upon this issue also. The question is twofold: 1st. Whether the fact involved in the issue is essential. 2d. Whether the court may determine the fact without a jury, upon the evidence, as reported, together with that taken and reported by a special master appointed for the purpose upon the original bill.

The question may be somewhat modified by the verdict of the jury upon the third issue, namely, "was the deed of the land and ore-bed delivered by the Stockbridge Iron Company and accepted by the Hudson Iron Company, with the mutual intention and understanding that it should be and was, in its present form, after the question had been raised and discussed between the parties, whether the reservation to the Stockbridge Iron Company was limited by the terms in which it was expressed in the deed, to ore to be used at its own furnaces?"

This issue was suggested by the course of the trial, and was submitted by the presiding justice in order to determine a question of fact upon the proof of which the defendant insisted that the second issue became immaterial. We are unable to see that the plaintiff could have been prejudiced in any way by the direction of the court, before the closing arguments, that this additional question should be passed upon by the jury. It was incidental to and in no respect diverse from the other issues tried. It was in a measure involved in the others. It grew out of and would be determined upon the same

evidence. The plaintiff did not, at the time, suggest that other or different evidence would be applicable, or that it existed. The second issue had been ordered upon the plaintiff's motion, after the parties had come together, with their witnesses and proofs, for the trial of the first, and against the objection of the defendant. Upon that issue a question of law was raised which, in the judgment of the presiding justice, rendered the third issue proper and expedient for its determination. The objection of the defendant does not appear to us to be well founded or reasonable. The whole matter was one of judicial discretion, and although, as such, it is open to revision in equity, we find no ground on which the propriety of the exercise of that discretion in this particular can be fairly impeached.

If the second issue was immaterial, or has become so by reason of the findings of the jury upon the other two, or if, for any reason, it ought not to have been submitted to the jury, it is competent for the court to disregard it in the further disposition of the case. It becomes necessary, therefore, to examine the precise position of the case, and the nature of the questions remaining undetermined.

As it now stands, after verdict upon the first and third issues, it is established that the deed is, in form and language, precisely what the parties intended it should be; that the plaintiff accepted it with full knowledge of the form in which its provisions were expressed, and that too, after discussion of the very question whether it restricted the grantor in the manner in which it is now claimed that it should do. But it is contended that both parties then understood alike that the deed, in its present form, did so restrict the defendant, and that there was a previous oral agreement between them for the sale of the land, by the provisions of which the defendant was to be so restricted. These questions are presented by the second issue.

It will be seen that there is a question thus presented by both branches of the issue, when taken together, which is not merely of a mutual mistake of law as to the construction and effect of the deed, but whether, by reason of such mutual mistake, the deed, contrary to the real intention of both parties, failed to be a full and complete execution of the previous con-

tract of purchase and sale. Such a mistake, if there are no legal objections to the enforcement of the oral agreement, will furnish sufficient ground for the interference of a court of equity to require a rectification of the deed: *Canedy* v. *Marcy*, 13 Gray, 373; *Hunt* v. *Rousmaniere*, 1 Pet. 1, 13; 2 Lead. Cas. in Eq., notes to *Woodlane* v. *Hearn*, 680; Story's Eq., § 115; Kerr on Fraud and Mistake (1st Am. Ed.), 418–421.

The foregoing proposition excludes the case of an instrument adopted by the parties as a modification of or substitute for a previous agreement, or where it was not intended fully or exactly to conform to the agreement. It also excludes the case of a deed given and accepted as the result of previous negotiations, where the precise terms of the sale and proposed conveyance had not been settled and agreed upon previously, or otherwise than by the written instrument itself.

Upon the ground of mistake, it embraces only the case of a completed oral or other precedent agreement; a deed intended to conform to it and carry it into effect according to its precise provisions; delivery and acceptance of the deed with the mutual supposition that it did so conform to the agreement. This ground of relief assumes that the deed is in form as it was intended and understood to be when accepted; the mistake consisting in the erroneous supposition that in fact and legal effect it corresponded with the oral agreement.

The third issue is not inconsistent with this position of the plaintiff; and the verdict upon it does not render the question presented by the second issue immaterial.

The objection that the second issue couples together two distinct questions is not tenable. The issue, in its legal aspect, is single; though it depends upon two propositions of fact, namely, a previously subsisting oral agreement, and a deed, intended to carry the agreement into effect, but by mistake and misunderstanding of the legal construction of its terms, failing to do so.

Upon examining the plaintiff's bill, we do not find any distinct or sufficient allegation of such an agreement, independently of the deed itself. Without it, the fact that both parties understood that the legal construction and operation of the deed would be otherwise than what it is now held to be, would not warrant its rectification to make it conform to that

supposed meaning. Mistake of law alone is not sufficient. There must be some agreement of the parties, distinct from the written instrument, to which the instrument may be made to conform. It may be otherwise when the alleged error is not in respect of the subject-matter of the contract, but in some incidental clause of restriction or condition. But in the present case it affects the subject-matter of the grant.

Nevertheless, as the defect of pleading has not been taken advantage of by demurrer, nor presented as a special objection to the issues, and the trial and argument have proceeded as if there were sufficient allegations in the bill in this particular, we are disposed to treat the case accordingly. The defect is amendable; and an amendment, under such circumstances, would be allowed, even at this stage of the proceedings.

Against the bill so amended, we have to consider the defense of the Statute of Frauds. This defense indeed goes to the whole scope and purpose of the bill, and if maintained, renders all the issues of no avail.

The position of the defendant is, that the clause in controversy is one of exception, and not of reservation, in a technical or legal sense. The question turns upon this distinction. If the defendant's mining rights are regarded as new rights, derived from its grantee under a reservation in the deed, then the operation of the clause by which those rights were acquired, may be restricted in equity, without violation of the Statute of Frauds. A title or right acquired by the grantor, by reservation in a deed poll, stands in this respect upon the same footing as that which is acquired by direct grant or conveyance. But whatever is excluded from the grant by exception remains in the grantor as of his former title or right; and to modify the deed so as to limit and reduce that, either in extent or duration of the estate or right retained, is in effect to enlarge the operation of the deed and make it convey estate, title or rights which the written instrument will not operate to convey. This is contrary to the Statute of Frauds: *Glass* v. *Hulbert*, 102 Mass. 24.

The court are of opinion that the clause in the deed, from the defendant to the plaintiff corporation, "reserving to the Stockbridge Iron Company the right of mining on the above

granted premises, for the use of said company, an amount of ore not exceeding seven thousand five hundred tons annually, at a duty of thirty-seven and a half cents per ton, including all the facilities needful for doing the same," must be construed as a reservation of new rights to the grantor, out of the granted premises; or else as the creation of such new rights by force of words of reservation, taking effect either by way of estoppel, or as a grant from the grantee, by implication of law from the acceptance of the deed: Cruise, Dig., tit. 32, c. 21, § 65; 2 Greenl. Ev., 347; note upon *Thompson* v. *Gregory*, 4 Johns. 81; Washburn on Easements, c. 1, § 2, pl. 5, referring to *Durham & Sunderland Railway Co.* v. *Walker*, 2 Q. B. 940, and *Wickham* v. *Hawker*, 7 M. & W. 63; *Doe* v. *Lock*, 2 Ad. & El. 705; 4 N. & M. 807; *Dyer* v. *Sanford*, 9 Met. 395; *Simonds* v. *Wellington*, 10 Cush. 313; *Vickerie* v. *Buswell*, 13 Maine, 289.

The property in the mines themselves, and in the ore they contained, must be held to have passed to the grantee by the deed. That which is reserved to the grantor, is a license to enter upon the granted premises and exercise certain rights therein, for the purpose of extracting from the mines a limited quantity of the ore, and revesting in the grantor the property in that which is thus separated from the mass. But until the ore is thus separated and becomes personal property, the title and legal possession of the whole rests in the grantee. The right of the Stockbridge Iron Company is an interest in land; but it does not constitute a title to any specific part of the mines, or of the ore contained in them, either as real or personal property. Neither is it such an interest as can be separated or made specific in any other mode than by the exercise of the privileges defined in the clause of reservation. Until then it is indefinite and inoperative: *Thompson* v. *Gregory*, 4 Johns. 81; *Dygert* v. *Matthews*, 11 Wend. 35.

The substance of the reservation or implied grant does not consist in the easements secured to the grantor, but in the right to extract ore and thereby acquire title and possession thereof. The easements are merely incidents, as means to this end.

The reservation of an exclusive right of this nature, might be held to retain in the grantor the property in the mines,

operating as an exception from the grant: *Cardigan* v. *Armitage*, 2 B. & C. 197; 3 D. & R. 414; *Farnum* v. *Platt*, 8 Pick. 339; *Munn* v. *Stone*, 4 Cush. 146; *Jamaica Pond Aqueduct Co.* v. *Chandler*, 9 Allen, 159. But this right is not exclusive. There is nothing in the deed to restrict the grantee from working the mines at the same time. even to the entire exhaustion of the ore: Bainbridge on Mines (1st Am. Ed.), 269.

The stipulation for a rate of duty by the ton, to be paid by the grantor, for all ore that should be mined, favors the construction of the clause as a reservation, rather than as an exception; or at least as a right to be held and exercised by the Stockbridge Iron Company, as one derived from the Hudson Iron Company, rather than one carved out of the former estate of the grantor, and withheld from the operation of the grant. The payment of such a duty is a recognition of the title of the party to whom it is to be paid, and indicates acquisition by the other.

In this view of the source of the defendant's rights, it is immaterial to this inquiry whether they arise by force of a reservation strictly, or by estoppel, or by implied grant. In either case they are equally open to be restricted by rectification of the clause upon which they depend.

Such being our conclusion upon this point, it follows, as already indicated, that a material issue remains to be tried. As to that issue, the order for trial of the case by jury is unexecuted.

We do not think the defense of *laches* ought to defeat the bill in this aspect of the case. If the assertion and attempted exercise of rights of mining by the defendant, after ceasing to carry on its business at Stockbridge and selling its furnaces, was notice to the plaintiff of the claim now made by the defendant, still, supposing this issue to be found for the plaintiff, it was notice of a claim inconsistent not only with the original agreement, but also with the terms and legal effect of the deed, as originally understood by both parties. That the plaintiff adhered to the understanding and construction which had been common to both, and relied upon that construction of the deed as a sufficient answer to the claims thus made, is not to be imputed as *laches*, by the defendant, without proof

that the plaintiff had become aware of the mistake, or ought to have discovered it and was guilty of neglect in not doing so and seeking the remedy sooner. It is a sufficient answer to any such position, that the true construction of the clause is a matter of serious controversy and learned argument by counsel in this case.

If this construction, now sought to be established by the Hudson Iron Company, is the true one, the issues are all inappropriate, and the cross-bill itself without foundation. The issues were framed, at the request of the Hudson Iron Company, upon the contrary assumption. But as the question was not then argued, and as it goes to the foundation of both suits, it should be now considered.

It is contended that the language, "for the use of said company," is a restriction upon the exercise of the rights reserved to the grantor, limiting the purposes for which alone mining could be done; that, as the Stockbridge Iron Company at that time was authorized only to manufacture pig iron at Stockbridge, and to work mines only for its own use, these limits of its corporate powers are to be imported into the deed, and thus furnish the measure of those purposes. Upon this construction, the rights would not be assignable, and would have ceased or become suspended when the Stockbridge Iron Company ceased to carry on its business of manufacture at Stockbridge, and sold its furnaces.

But we can not give so restricted a construction, even against a grantor, to language which is so commonly employed in conveyances, and thereby has acquired a well known significance. When so employed, the phrase is expressive of the right of appropriation or enjoyment, rather than descriptive of the purposes or mode of the use. It does not call for any extrinsic aid for its interpretation.

The meaning contended for is not the natural and ordinary one; there is nothing in the context, or in the application of the language to the subject-matter, which creates an ambiguity; and we think the facts in regard to the corporate powers of the grantor, and the entertained purpose of discontinuing its business, are so far extrinsic as not to be competent to raise an ambiguity for the purpose of settling it against the more obvious sense of the terms used.

Until the remaining issue has been again submitted to a jury by itself, we do not deem it necessary or expedient to proceed further with the original bill, or to consider the several other questions that have been argued before us.

The case will therefore stand for trial by jury upon that issue in the cross-bill when amended; and in that trial the facts established by the verdict upon the other two issues will be taken as conclusively settled between the parties.

Ordered accordingly.

APPEALS OF ALDEN ET AL.

(93 Pennsylvania State, 182. Supreme Court, 1880.)

[1] **Reservation of ore for supply of one furnace not limited to capacity of furnace then in use.** In 1786 Peter Grubb conveyed to Robert Coleman, Sr., an undivided one sixth part of the Cornwall ore banks. The deed contained the following reservation: "Saving and reserving unto the said Peter Grubb, the grantor, his heirs and assigns forever, the right, liberty and privilege at all times hereafter, of entering upon the premises hereby granted and released, with his and their horses, carts, carriages and servants, and of digging, raising and hauling away a sufficient quantity of iron ore for the supply of any one furnace at the election of the said Peter Grubb, his heirs or assigns, at all times hereafter." It was claimed that under this reservation the grantor, or his assigns, were only entitled to a sufficient quantity of ore to supply a furnace such as was known in Pennsylvania at the time the deed was executed, and a bill was filed for an account of the ore taken in excess of that quantity: *Held*, that a court of equity had jurisdiction of the bill and could grant relief. *Held, further*, that this reservation carried with it the right to enough ore to supply a furnace with all the modern improvements to be selected by the grantor or his assignees, and that the right to select was not exhausted by its exercise in a single instance.

Idem—The measure of the quantity of the ore was so much ore and no more, as a given furnace would use in the course of a year, taking into consideration the wear and tear, and the necessity of its going out of blast for repairs at stated intervals.

Furnace supply—Exchange of ores—Digging for sale. A party entitled to take ore to the extent of the supply of one furnace, where the furnace requires a mixture of ores, may rightfully take out ore to the extent of the quantity which the furnace can consume, for the purpose of

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[1] *Dand* v. *Kingscote*, 6 M. & W. 174; *Bishop* v. *North*, 15 M. R. —

using, in part for the furnace and in part for exchange for other ores, but may not extract ore for general sale.

Reservation limited by annual periods. Where parties entitled to take ore to the capacity of the furnace, neglected during any year to run the furnace, they are not entitled, in succeeding years, to take the ore which they omitted during the period when the furnace was idle.

Interest is chargeable on ore taken in excess of the quantity limited by the reservation.

It is too late for executors to set up the Statute of Limitations, who made no suggestion thereof when made parties to a bill six years after the death of their testator, nor six years thereafter when they filed an amended bill.

Appeals from the Court of Common Pleas, No. 4, of Philadelphia County.

These appeals were taken from a final decree of the court in a suit in equity, in which Robert and George Dawson Coleman were complainants, and Robert W. Coleman, William Coleman, Henry P. Robeson and Clement Brooke, were defendants.

During the progress of the cause, all the defendants to the original bill died, and their executors and devisees were brought in by supplemental bill.

The bill which was filed July 15, 1856, in the Supreme Court at *nisi prius*, set forth: That on the 9th of May, 1786, Peter Grubb, Jr., conveyed to Robert Coleman all his one undivided sixth part in the Cornwall furnace estate, including as part thereof, one undivided sixth part of the Cornwall ore banks and mine hills, reserving unto himself, his heirs and assigns, the right at all times thereafter, of entering on the said premises and digging and hauling away a sufficient quantity of iron ore for the supply of any one furnace, at the election of said Peter Grubb, Jr., his heirs or assigns, at all times thereafter.

That subsequently, the said Robert Coleman became the owner of four other undivided sixth parts of said Cornwall ore banks and mine hills, and that the said five undivided sixth parts of said ore banks, subject, as to one undivided sixth, to said reservation, were vested in certain proportions in the complainants, and the defendants Robert W. and William Coleman. That in May, 1788, the said Peter Grubb, Jr., conveyed all his estate in said reservation to George Ege, who owned the Reading furnace estate, and that the said George Ege continued

during his life to supply said furnace with ore, taken from the said Cornwall ore banks under said reservation; and that during his lifetime, the said Ege did not use the ore taken under said reservation, for any other purpose than the supply of the said Reading furnace; and that the said Ege did thereby elect and determine the one furnace to be supplied under said reservation, from that time thenceforth forever. That said Reading furnace was a cold blast charcoal furnace, requiring, when worked to its maximum capacity, fifty tons of ore per week—but using ordinarily much less. That it required two tons of Cornwall ore to make one ton of iron, and that the greatest capacity of furnaces built and worked by the best process then known was, as late as 1790, not more than twenty-nine tons of iron per week, and the average capacity not more than twenty tons of iron per week. That by improvements in the building and operating of furnaces, their capacity, when the bill was filed, was tenfold what it was in the year 1790. That the possible productive power of furnaces, and their corresponding capacity for consuming ore, is indefinite and unascertainable, but that the amount of ore required for their supply in the past or present is easily capable of ascertainment. That among the causes of the increased productive capacity are improved machinery, the introduction of the hot blast, and the use of anthracite coal as a fuel. That the first of these causes was gradual, the second was not invented till about the year 1830, and the third was first introduced in this country about the year 1839. That the legal effect of the reservation was to vest in said Peter Grubb, Jr., in fee simple, a right to dig, take and haul away, for the purpose of being converted into iron, such a quantity of iron ore as could be so converted by one furnace, and that this quantity was to be determined by the capacity of one furnace then erected, or to be erected, and by said Peter Grubb, Jr., or by his heirs or assigns elected or fixed upon as the furnace which should be supplied under said reservation, and that the quantity to be taken was at all times thereafter limited to the amount which by said furnace, at the time of said election, was capable of being converted into iron. That the defendants, Brooke and Robeson, owned the Reading furnace, and the ore right reserved in the deed of May 9, 1786, and that they

have in their possession and control the books and accounts of said furnace from 1788 to the date of the filing of the bill, and that said books and papers will show what was the quantity of ore which has been used from the Cornwall ore banks for the supply of said furnace, under said reservation, and that said books and papers will show the extent of the right reserved, as ascertained and fixed by the election of the said George Ege, and by user from that time until the defendants, Brooke and Robeson, became the owners of the same. That the said Reading furnace was not, until the year 1845, capable of using more than two thousand tons of ore annually, but that in that year the defendants, Brooke and Robeson, pulled down the old Reading furnace, and in its place erected a new furnace of larger dimensions and with new appliances, wholly unknown until years after said reservation was made, by means whereof the capacity of the present Reading furnace has been made one hundred and sixty tons of ore per week. That since the erection of said new furnace the said defendants, Brooke and Robeson, pretending that they have a right under said reservation to take as much ore as they can use in supplying a furnace of any size, have taken away a large quantity of ore in excess of what they are entitled to take; and that the books, papers and accounts of said defendants will enable them to state an account of the same. That said defendants, Brooke and Robeson, had built a second furnace, and claimed to take ore under said reservation for the supply of both; using one, however, when the other was out of blast, so that the consumption of ore should be continuous, and that the consumption of ore is less when there have to be suspensions for repairs; that such suspensions have always been known to be necessary, and were so especially in 1786, and necessarily entered into the estimate of the measure of an ore-right for the supply of one furnace, and that the defendants, Brooke and Robeson, have under their control books and papers which will show how often and how long have been the ordinary suspensions at the old Reading furnace for repairs, which are usual and indispensable. That said defendants, Brooke and Robeson, under a pretended claim of right, by virtue of said reservation, have carried away ore from the Cornwall ore banks and sold the same, and that the books and accounts will show how much.

The bill prayed: 1. Discovery of the amount of ore used at the old Reading furnace, of the amount necessary for the supply of the new furnaces built by the defendants, Brooke and Robeson, and of the amount used in the same, and of the quantity sold. 2. That the extent of the right reserved under the deed of May 9, 1786, be defined, and that the defendants, Brooke and Robeson, be decreed to have under said reservation a right to take ore for the supply of a furnace not exceeding such quantity as was used for the supply of the Reading furnace by George Ege, or for the supply of one furnace at the date of the reservation, and that they be restrained from selling any ore taken under said reservation, and from taking more than by the decree of the court they may be entitled to take for the supply of such furnace as the court may decide they are entitled to supply. 3. That an account be taken of all ore unlawfully taken away, used, sold or consumed otherwise than the said defendants are lawfully entitled to take and use. 4. General relief.

The answer of the defendants, Brooke and Robeson, averred:

That on May 9, 1786, Peter Grubb, Jr., conveyed all his one undivided sixth part of the Cornwall furnace estate, including the Cornwall ore banks, to Robert Coleman, and thereby ceased to be the owner of any furnace. That by the saving and exception in said deed there remained in Peter Grubb an estate in the premises conveyed, "which was a right in gross, or at large, neither appendant nor appurtenant to lands, but annexed to the grantor's person, to him, his heirs and assigns forever; * * * that neither the deed nor the reservation required that Peter Grubb, his heirs or assigns, should become the owner of a furnace to enjoy it;" and that the measure of the quantity of ore which could be taken under it was the capacity of any furnace to be elected as a measure, and that such election was not to be made once, but at all times as often as the owners of the ore-right chose to make an election. That at the date of the reservation furnaces were known to be of different sizes and capacity, and it was well understood that they might be improved, both in their construction and mode of blowing, so as to increase the quantity of iron made and ore consumed. That after the execution of the deed of May 9, 1786, Peter Grubb supplied ore to the Berkshire fur-

nace (situated six miles east of the place where the Reading furnace was afterward built), under an arrangement with the owner or owners of said furnace; that on May 1, 1788, he conveyed the ore-right to George Ege, who erected the Reading furnace, and supplied it with ore under the ore-right, but did not elect it as a measure of the right nor make the right appendant or appurtenant to it. That the defendants (Brooke and Robeson) have become owners of the ore-right and also of the Reading furnace estate; that they have erected thereon a larger furnace, using anthracite coal and furnished with hot blast; and that furnaces as now constructed require more ore and produce more iron than either of the furnaces owned by Robert Coleman on May 9, 1786. That the defendants have the right from time to time to elect any new furnace as the measure of the ore-right, and to use the ore as they please; that they have not at any time taken from the ore banks more than sufficient for the supply of such furnace, although they have made sales of part of that quantity; that they have taken less in any one year than the quantity to which they were entitled, and they claim the right to take so as to make up the deficiency; and that for the supply of a furnace of approved construction, which they for the present elect as the measure of quantity, twenty thousand tons of ore are yearly required. That frequently ore fit to use has been exhausted at particular places; that as the mining becomes deeper the quality of the ore deteriorates, and that the owners of the ore bank have sold ore contrary to an agreement between themselves, and that from these causes the "paramount estate vested in these defendants" is seriously impaired. That it was agreed by Robert Coleman, in his lifetime, and the owners of the ore-right, that the latter might take as much ore as they pleased from their own mine-holes. That it is true that the Reading furnace was a cold-blast charcoal furnace, worked by water power. That they are not informed and can not answer whether the utmost capacity of the said furnace as used by George Ege was fifty tons per week; but neither Ege nor the defendants ever took from the said ore banks the full quantity to which they are entitled, and defendants claim the right to make up the deficiency. Defendants admit that on the 9th of May, 1786, cold-blast charcoal furnaces alone were used in

Pennsylvania, but deny that the greatest average capacity of such furnaces was twenty tons of iron per week, or that it was believed to be impossible to produce a greater quantity. They admit that it takes about two tons of Cornwall ore to make one ton of metal. That since May 9, 1786, the construction of furnaces has been improved by enlarged boshes and increased height, and by the hot blast; that the use of anthracite coal has been introduced, so that now, and for many years past, a much greater quantity of ore is required for a furnace than on the 9th of May, 1786; and the defendants claim as the measure of their ore-right a furnace of the best construction, and having the largest known capacity. That by reason of the better qualities of ore being exhausted by surface mining, the use of anthracite coal and the hot-blast furnace had become a necessity to reduce the ore by reason of the increased quantity of sulphur and other foreign substances intermingled therewith. That by experiment it has been ascertained that a mixture of Cornwall ore greatly improves the quality of the iron; that such mixture is necessary for salable iron, and that for the purpose of making such mixture, defendants claim the right to sell some or all of the Cornwall ore which they take for the supply of any one furnace of the best construction. That the defendants have in their possession the books and accounts of the Reading furnace but that the same do not fix the extent of the ore-right reserved in the deed of May 9, 1786. That it was never denied by Robert Coleman (the elder) and his successors that furnaces might be improved from time to time, or that the right of election under the ore-right extended to such improved furnaces. That defendants have built upon the Reading furnace estate a new and improved furnace of a capacity of about one hundred and fifty tons per week, and they claim to take ore sufficient for supplying a furnace of the best construction, and to use the same or a portion thereof, at the furnace which they have built.

The answers to the interrogatories in the bill aver: That the Reading furnace was completed in 1793 by George Ege; that before the completion of this furnace, ore was taken under the reservation and used at the Berkshire furnace. That they pulled down the old furnace and erected a new one in 1845;

but that owing to the inferior quality of the ore obtained, it produced on an average about the same amount of iron as the old one; that they had commenced a new hot-blast furnace of a capacity of from one hundred to one hundred and fifty tons a week; that they had also sold some five thousand tons of ore; that it requires two tons of Cornwall ore to make one ton of iron.

The answer of the defendants, who either represented or stood in the place of the original defendants, Brooke and Robeson, was filed in May, 1873, and averred:

That the furnace commenced in 1854, was completed in 1858, and with the furnace rebuilt in 1845, was known as the "Robesonia furnaces."

That the one rebuilt in 1845 was called No. 1, the other No. 2, and that all the ore used since the completion of No. 2 had been used by it, except four thousand three hundred and seventy-seven tons used at No. 1 when No. 2 was out of blast. The original answer was adopted as part of this answer. The answer also averred that there were charcoal furnaces producing from one hundred to one hundred and twenty-five tons of metal per week.

After the answer of the defendants, Brooke and Robeson, had been filed, the bill was amended by asking for relief in the alternative, should the court construe the reservation differently from what the complainants had averred was its legal effect.

The amendment also denied certain pretenses of the defendants, Brooke and Robeson, viz.: 1. That when they had taken less than they were entitled to for one period, they could take more than they would be entitled to in another period to make up the deficiency of the former period. 2. That they could sell ore equal to the amount of different ores which they mixed with Cornwall ore they used. 3. That they could use the ore continuously by using one furnace when another went out of blast. 4. That they could use the ore for the supply of a furnace of any capacity whatever. 5. That the right to take ore was without limit.

The answer of the defendants, Robert W. Coleman and William Coleman, and the answer of their successors and representatives, adopted substantially the averments of the

bill, except so far as they set out the proportions in which the complainants and defendants owning the ore banks were entitled thereto, and joined in the prayers of the bill.

The case was referred to an examiner and master, Peter McCall, Esq., who reported the following facts as deduced from the testimony:

On the 26th of September, 1785, articles of agreement were entered into between Peter Grubb, the younger, described as of the township of Heidelberg, in the county of Berks, iron-master, and Robert Coleman, of the township of Elizabeth, in the county of Lancaster, iron-master, by which Mr. Grubb, in consideration of £8,500 in gold or silver, lawful money of Pennsylvania, covenanted on or before the 1st of May then next, to grant and assure to Mr. Coleman all the estate which his father, Curtis Grubb, had conveyed to him by the above mentioned deed, "except and specially reserving unto the said Peter Grubb, Jr., his heirs and assigns, the liberty of digging, raising and hauling away a sufficient quantity of iron ore to supply the furnace which he purchased of John Patton, or any other furnace which he may erect elsewhere, provided there is not more than one furnace blowing at the same time."

It appears that in the interval the contract with Patton was annulled, for in 1790, Bridget Patton, the widow of John Patton, who took by survivorship the Berkshire furnace, conveyed it to George Ege.

On the 9th day of May, 1786, Peter Grubb conveyed to Robert Coleman the hereditaments and premises which he had derived from his father, Curtis Grubb, "saving and excepting unto the said Peter Grubb, the grantor, his heirs and assigns forever, the right, liberty and privilege, at all times hereafter, of entering upon the premises hereby granted and released, with his and their horses, carts, carriages and servants, and of digging, raising and hauling away a sufficient quantity of iron ore for the supply of any one furnace, at the election of the said Peter Grubb, his heirs or assigns, at all times hereafter, anything hereinbefore contained to the contrary thereof in anywise, notwithstanding."

The sixth of the Cornwall ore banks and mine hills was not specifically named or mentioned in this deed, but passed under the general words of the grant, "All and singular other the lands, etc., etc., late the property of the said Curtis Grubb."

The deed contains a covenant for further assurance of the premises "saving and excepting always thereout, the right, liberty and privilege hereinbefore reserved unto the said Peter Grubb, his heirs and assigns, of a sufficiency of iron ore for the use of one furnace forever."

Mr. Grubb exercised this ore-right by supplying the Berkshire furnace, situated about four miles from the present Reading or Robesonia furnace.

On the 7th of May, 1788, Peter Grubb, for the consideration of £3,000 in gold and silver, granted to George Ege, his heirs and assigns, "all the right, liberty and privilege aforesaid, of him, the said Peter Grubb, his heirs and assigns, of entering, at all times hereafter, upon the premises aforesaid, with his and their horses and carts, carriages and servants, and of digging, raising and hauling away a sufficient quantity of iron ore for the supply of any one furnace, at the election of the said George Ege, his heirs or assigns, at all times hereafter."

Ege continued to use the ore from Cornwall at the Berkshire furnace until the completion of the Reading furnace in 1793. From that time it was used to supply the Reading, now called the Robesonia furnace.

The furnace and ore-right, after various intermediate changes of ownership, became vested, in 1845, in Robeson, who afterward conveyed one half thereof to Brooke.

The average yield of furnaces in the region in which Cornwall is situated, built prior to 1800, did not exceed thirty tons a week; the maximum yield thirty-five tons. From 1800 to 1830, no furnace in the United States, or anywhere else, using charcoal as fuel, could have produced more than 1,000 or 1,200 tons of iron a year, while the average product of furnaces of the present day would be very nearly 200 tons per week.

From the statement of the account of ore taken from the Cornwall ore banks and mine hills to Robesonia furnace, it appears that in the year ending January 1, 1858, the quantity taken was 2,081 tons. In the following year it went up to 10,314 tons. In the year 1868 it was 12,925 tons.

This great increase in the quantity of ore taken is mainly due to the use of steam instead of water power, the introduction of anthracite coal as a fuel, the hot blast and the use of

three tuyeres instead of one. The mode of producing blast in this State in 1786 was by wooden bellows worked by water power.

The steam engine was first applied to driving blast in Pennsylvania about the year 1839. In England it had been used for that purpose long anterior to its use in this country. It was so used there shortly after its invention by Watt. His first patent was in 1769, although it was not until 1774 that he was able to produce any great practical results. The introduction of the steam engine was a very important event in the manufacture of iron, as greater volume and pressure of blast was obtained with steam than with water power, and it possessed the great advantage of furnishing a uniform power, not affected by drought or freshets. The only fuel used in this State, and indeed in this country, in 1786, for the smelting of iron ore, was charcoal. In England mineral coal has been generally used in blast furnaces since the year 1750, but with us the use of charcoal as a fuel for furnaces continued up to 1839. The first anthracite used in Pennsylvania in making iron was at the Crane Works, in 1840.

The existence of coal in the Wyoming region was known as far back as 1766. Coal was known to exist at Pittsburg as early as 1769. Charcoal furnaces went out of blast every autumn, and continued out of blast about three months, the miners becoming wood-choppers in the winter in order to prepare fuel for the next season.

The blast in 1786 was the cold blast. Neilson's invention of the mode of heating the air before it passes into the furnace, called the hot blast, was patented in 1828. Only one tuyere or opening for the introduction of air into the furnace, was in use in this State in 1786. In the making of iron in this State with the old charcoal furnace, only one tuyere was used. Mr. Forney tells us he never saw two tuyeres used until 1838.

Besides those more important improvements which constitute epochs in the history of iron manufacture, there have been lesser improvements in machinery, greatly increasing the result, without reference to particular eras.

The defendants, the owners of the ore-right, had used iron ore in two furnaces, running one while the other was out of blast; and the amount they had used was largely in excess of the capacity of furnaces in 1786.

Upon these facts the master, *inter alia*, reported:

"On the whole I am of opinion, and so report, that the owners of the ore-right reserved by the deed of 9th May, 1786, are not restricted to the quantity of ore used by Mr. Ege at the time he elected the Reading furnace; but that they have a right to a sufficient quantity of iron ore to supply any one furnace, from time to time to be selected by them, although of larger capacity than the Reading furnace elected by Mr. Ege, and using anthracite as fuel, the hot blast and other modern improvements in the manufacture of iron, not known and in use at the time of the election of the Reading furnace.

"I am also of opinion, and so report, that they can use the ore taken under this ore-right in one furnace only elected by them, and not part of the time in one furnace and part of the time in another furnace, as they have done in No. 1 furnace, while No. 2 furnace was out of blast.

"The owners of the estate out of which the ore-right was reserved, have a right to any benefit that may arise from the furnace elected being out of blast for purposes of repair or other cause.

"I further report that under this ore-right they can use the ore taken by them only to supply the furnace elected by them, and that they have no right to sell or otherwise dispose of the ore."

Exceptions were filed to the master's report, which the court dismissed, and his report was confirmed.

It was also ordered that the case be referred back to the master to state the accounts and to report what sums, if any, are due by the defendants, or any of them, to the plaintiffs, or any of them, by reason of the taking of said ore.

In his supplemental report the master charged the estates respectively, represented in appeals Nos. 109, 110 and 112 with the amount of ore unlawfully taken from the Cornwall banks, and with interest on the value of the ore from the time it was taken. Anne C. Alden and others excepted because the decree of the master was not in accordance with the prayer of the bill.

The parties in No. 111 excepted because the court had not allowed the defense of the Statute of Limitations to claims for ore sold during the lives of the decedents, because interest

was allowed on the claims, and because they had charged for ore taken for one furnace while the other was out of blast. The parties in No. 112 also excepted for this last reason alone.

The court dismissed the exceptions and confirmed the master's report, whence this appeal.

S. S. HOLLINGSWORTH, JAMES L. REYNOLDS, GEORGE W. BIDDLE and F. W. HUGHES, for appellants, Anne C. Alden et al.

JAMES E. GOWEN, *contra*, and also for appellants in Nos. 109, 110 and 112.

JAMES W. PAUL, for appellants in No. 111.

S. S. HOLLINGSWORTH, JAMES L. REYNOLDS, GEORGE W. BIDDLE and F. W. HUGHES, for appellees in Nos. 109, 110, 111 and 112.

PAXSON, J., delivered the opinion of the court.

The above appeals are all from the same decree; they may properly be discussed in one opinion and will be considered in the order above stated.

Alden's Appeal, No. 102. The underlying question in this, as well as the other appeals, is the proper construction of the reservation in the deed from Peter Grubb, Jr., to Robert Coleman. In this appeal the particular question is, whether the appellees, in whom are now vested the rights reserved by the said Peter Grubb, Jr., in said deed, are entitled to a full supply of ore for a modern furnace with all the recent improvements of the hot blast, the use of anthracite coal for fuel, of steam engine for power and with three tuyeres instead of one, or whether they are to be restricted to sufficient ore for the charcoal furnace as it existed at the time of the reservation. The question is important as it affects the parties for the reason that the modern furnace will make ten times as much iron as the old charcoal furnace with its coal blast admitted by a single tuyere, the uncertain power of water and the certain blowing out of the furnace in the fall, to enable the men to chop wood and make charcoal in the winter.

The learned court below held, affirming the master, that the appellees were entitled to a supply of ore for a modern furnace: that they had a right to elect what furnace should be supplied and that the right of election was not exhausted by its exercise upon a single occasion. In other words, they could change the furnace from time to time, as the exigencies of their business or their convenience might require. Both the master and the court below have so well vindicated their respective rulings upon this branch of the case that there remains little to add. We see no ambiguity in the reservation; nothing which extrinsic evidence is required, or would be even permitted to explain. Where such is the case no more unsafe rule could be adopted than to search for a meaning of the parties that is not doubtful, and to write into their agreements matters which they have left out. It would have been very easy for Peter Grubb and Robert Coleman, when they contracted in 1786, to have placed a fixed limit upon this reservation. They were both iron-masters and men of intelligence, and knew, or must be presumed to have known, just what they were about. They could have limited the supply to a fixed number of tons, or knowing, as they did, the capacity of the furnaces of their day, they could have agreed that the annual consumption of one of them at that time should be the maximum beyond which the reservation should not go. It is no part of our duty to speculate as to why they did not limit the amount of ore by a fixed standard; it is enough for us to know that they have not done so, yet, if it were necessary, it would not be difficult to find excellent reasons why they adopted a shifting standard. We must assume that in contracting they mutually contemplated future improvements in the manufacture of iron, or else deny them average intelligence. Prior to 1785 a marked advance had been made in England. Then Smeaton's cylindrical blowing machine had already supplanted the rude wooden bellows, worked by water power here up to and later than 1786. While it is true that the steam engine was not applied to driving blast in Pennsylvania until 1839, yet it had been known in England many years before, and was in practical successful operation prior to 1785. So as to the use of mineral coal as fuel for making iron. It was not introduced here until 1839, but in England it had been used in

blast furnaces since 1750. It may be that the great abundance and cheapness of wood in this country delayed for some time the introduction of mineral coal for such uses.

The reservation was of sufficient ore for one furnace at all times thereafter forever. This was a perpetual reservation, or at least for so long a time as the ore banks should remain unexhausted.

This reserved to Peter Grubb, his heirs and assigns, a certain interest in the ore in common with the owners of the ore banks. At the time of the reservation other furnaces were being operated in the same manner as the Berkshire furnace, and using the ore in substantially similar quantities. The ownership of the Cornwall ore banks had since that time become further subdivided by death and conveyances. Other furnaces have been constructed and all are being operated with the modern improvements, and are using a corresponding increased amount of ore. To allow them to thus increase the consumption, and yet to confine the heirs or grantees of Peter Grubb to the quantity consumed in the old charcoal furnace of 1786, would be a forced and arbitrary construction of the reservation, and instead of carrying out the probable intention of the parties would, in our opinion, be doing violence to any reasonable view of what they contemplated at the time. It is but just to suppose they expected that Peter Grubb, his heirs and assigns, should operate this one furnace as other owners were operating theirs. There was no essential difference at the time of the reservation. Why should there be now? It was manifestly the intention that the reservation should be of a certain proportion of the ore. By allowing to the appellees the same improvements in the manufacture of iron as are enjoyed by the appellants this proportion can be maintained, and it can be done in no other way. These furnaces may be compared to so many candles, all lighted and consuming this ore at the same time. Peter Grubb's candle burns no faster than the others, and while this is the case the appellants have no just cause of complaint. If the appellants may draw upon these ore banks without limit, with the use of all the modern improvements by means of which the manufacture of iron is rapidly multiplied, and yet hold the grantees of this reservation to the supply of the antiquated charcoal furnace, it is mani-

fest the reservation itself is immensely diminished in value, and it is only a question of time, depending upon the extent of the ore banks, when it will be entirely defeated.

We need not pursue this branch of the case further. We are of opinion that the reservation gives the appellees the right to as much ore as will supply any one furnace to be selected by them, and that the right to select was not exhausted by its exercise in a single instance. This appeal is not sustained.

Ferguson's Appeal, No. 109. July term, 1878. This was an appeal by the executors of William R. White, deceased.

The learned court below held that under the reservation of said deed of May 9, 1786, from Grubb to Coleman, 1st, that the appellants are only entitled to a supply of ore for one single furnace selected, and can not, while such furnace is undergoing repairs, use it in another furnace; 2d, that the appellants must use the ore in the furnace so selected, and have no right to sell the same, or any part thereof, and that for ore so used they were liable to account to the appellees. A decree was accordingly made against Nathaniel Ferguson and the estate of said William R. White, that they pay to the appellees the sum of $912.06, for ore used in Robesonia furnace No. 1, from June 5, 1867 to June 25, 1867, and a further decree against the same parties of $32,773.55 for ore used in Robesonia furnace No. 1, from March 13, 1873, to May 24, 1874. So far as the above decrees were for ore used in Robesonia furnace No. 1, while No. 2 was undergoing repairs, we think they are correct. Regarding the words in the reservation, "a sufficient supply of ore for any one furnace," as a measure of quantity, we must interpret them to mean so much ore, and no more, as a given furnace would use in the course of a year, taking into consideration the wear and tear, and the necessity of its going out of blast for repairs at stated periods. No furnace can continue in blast forever; hence when parties fix the capacity of a certain furnace as a measure of the quantity of ore, they must be presumed to have had in view the fact that every furnace must stop at times, not only for ordinary repairs but for other accidents and contingencies to the business.

The use of furnace No. 2 from time to time, pending

repairs to No. 1, the selected furnace, was using more ore than any one furnace was capable of doing, and hence can not be presumed to have been in the contemplation of the parties, as it certainly is not within the terms of the reservation. That portion of the decree, however, which charges the appellants with the ore used in Robesonia furnace No. 2 from December 31, 1873 to May 28, 1874, rests upon a different footing. During all of this last period, No. 1 was in repair, and could have been put in blast. That this was not done was due to the belief of the appellants, as we gather from the offer of evidence rejected by the master, that they had a right to use No. 1 instead of No. 2. That they had no such right is manifest. If, however, there had been an honest mistake here, the appellees have no right in equity to take advantage of it unless they can show they have been injured. They have not shown such injury. The appellants had the right to use the ore in No. 2; had they done so, the consumption of ore, according to the offer, would "have been much larger than was consumed in No. 1." It is true by using No. 1 for five months, it enabled the appellants to operate No. 2 just that much longer without stopping for repairs, and to that extent, perhaps, the appellees may claim to have been injured. But this injury, if not within the rule *de minimis*, is capable of being defined in extent by the master, and may have been more than compensated by the lesser quantity of ore consumed by No. 1. The appellees must remember that they are appealing to the conscience of a chancellor, as well as seeking the enforcement of legal rights, and that before they can ask for a decree in their favor for this particular ore, they must show some equity which would make it unjust to withhold it. We are of opinion that the master ought to have heard and considered the evidence referred to in the seventh assignment of error, and to this extent we sustain this appeal. The right to sell ore will be considered in the next appeal.

Appeal of Nathaniel Ferguson et al., executors of William R. White, deceased, and of Sarah D. Robeson, executrix of Henry P. Robeson, deceased. No. 110, July Term, 1878. This appeal raises two questions distinct from those already discussed, viz.: 1. The right of the appellants, or owners of the ore-right, to sell or dispose of the ore so taken by them

otherwise than in the supply of the selected furnace; and 2. On behalf of the estate of said Henry P. Robeson, the liability to interest on the amount charged as the value of the ore taken between November 6, 1861, and March 31, 1862.

Upon the question of the sales of ore there is an obscurity as to the facts, both in the history of the case and in the report of the master. Nor is any additional light thrown upon this subject in the opinion of the court. The learned judge says: "With regard to the ore sold by Robeson and Brooke in 1855 and 1856, it does not appear from the master's report under what circumstances that ore was sold; whether it was surplus ore remaining unused at the furnace or ore sold directly from the banks. It is perhaps immaterial, for as the defendants had no right to mine ore for the purpose of sale, neither could they sell what was mined for the supply of their furnace."

We do not assent to the broad proposition that the appellants had no right to sell ore under any circumstances. It is conceded they could not supply the elected furnace and at the same time sell additional ore from the banks. This would extend the reservation beyond its terms, and make it as broad as the grant itself. It would be using more ore than was requisite for the supply of one furnace. But the appellants claimed, and so aver in their answer, that a portion of the ore sold was to make up for the ores used by them from other mines, and the schedules in their answers give the data upon which this claim is founded. If, as they assert, ores from other mines were mixed with the Cornwall ores, and so used in their furnace to improve the quality of the iron, they would have a right to sell a corresponding amount of Cornwall ore. To illustrate: If the selected furnace consumed ten thousand tons of ore in any one year, all of which the appellants were entitled to take under the reservation, and it was found that a better quality of iron could be obtained by the mixture of twenty per cent., say two thousand tons, of other ore, they would have a right to exchange that number of tons of Cornwall ore for such purpose; or to sell the same, and with the proceeds purchase the same quantity of other ores. This results from two causes: 1. The right to take a full supply for the selected furnace; and 2. Their right of dominion or abso-

lute property in the thing taken. The reservation of the ore right was not necessarily connected with the use of the furnace, except so far as it is necessary to measure the quantity. The appellants are under no obligation to operate the furnace which they may select; they are entitled to select a furnace, and to sell to the proprietor thereof a sufficient supply from the Cornwall ore banks. They may not sell to different furnaces, nor more than a supply to the selected furnace, for that would exceed the reservation. But the ore, when taken out under the reservation, and to the extent it authorizes, is as much the property of the appellants as the ore remaining in the banks is the property of the appellees. To impose such a restraint upon the use and alienation of property as is here claimed by the appellees would require the clearest language in the deed. Yet there is not a word in that instrument to justify such a claim. The appellants have an absolute right of property in the ore the moment it is taken out of the banks, subject to the single qualification that it must pass through some one furnace to be selected by them for the purpose of measuring the quantity. It therefore becomes of the highest importance to know under what circumstances the ore in question was sold, and for this purpose the case must go back to the master. The master finds sales by Brooke and Robeson from the Cornwall ore banks of over six thousand tons. The answer avers the use by appellants of other ores at the Reading furnace of over one thousand tons. To this extent, at least, they were entitled to sell Cornwall ore. The claim of the appellants, to make up the deficiencies of former years, is not sustained. They can not take in one year what they might have taken the previous year, but neglected to do so. The right, if not exercised, or only partially exercised, for any one year, is gone with the expiration of that year.

We are unable to see any sufficient reason why interest should not be charged against appellants upon whatever is found against them, for excess of ore. They have sold it and received the money. For the purpose of complete indemnity the interest is as essential as the value itself. This point does not need elaboration. To the extent indicated this appeal is sustained.

Appeal of Edward Brooke et al., No. 111, July term, 1878;

appeal of William R. White et al., No. 112, July term, 1878. These appeals present but a single question not already disposed of. The appellants have interposed the Statute of Limitations. This bill was filed July 15, 1856. The answer of Messrs. Robeson and Brooke was filed on the 15th of October of the same year. The former died March 8, 1860, the latter, May 18, 1861. The appellants, the executor and executrix of said parties, respectively, were not made parties to the bill until September, 1867. This was more than six years after the death of their respective testators, and if the appellant had set up the statute by plea or answer when they were first brought in, they would have had a stronger case. But they answered the amended bill in 1873, and did not suggest the bar of the statute. The record shows no step taken by the executors objecting to the revival of the suit on the ground of lapse of time. It is too late to do so now. These appeals are, however, sustained for other reasons, sufficiently set forth in the other cases.

The question of jurisdiction alone remains. This is common to all the appeals. A motion to quash was made upon this ground, and *Grubb's Appeal*, 9 Norris, 228, was cited in support of said motion. We need not extend this already protracted opinion by a discussion of this question. The distinction between *Grubb's Appeal* and the case in hand is palpable.

The motion is denied.

We have not considered it necessary to refer to the numerous authorities cited on either side. Few of them have any bearing upon the case. We have been led to our conclusions more from the terms of the reservation, and its surrounding circumstances, than from the authority of decided cases which are not in point.

This cause came on to be heard and was argued by counsel at the last term of this court, held in the city of Philadelphia, whereupon, May 3, 1880, it is ordered and adjudged that the decree be affirmed as to Anne C. Alden et al., appellants, in No. 102, July Term, 1878, and their appeal is dismissed as to them with costs, and that said decree be reversed as to Nathaniel Ferguson et al., appellants in No. 109, July term, 1878; Nathaniel Ferguson et al., appellants in No. 110, July term,

1878; Edward Brooke et al., appellants in No. 111, July term, 1878, and William R. White et al., appellants in No. 112, July term, 1878, and that the record be remitted to the court below for further proceedings in accordance with the principles indicated in this opinion.

Justices GORDON and TRUNKEY dissented to the affirmance of Alden's Appeal.

1. Mines, timber and quarries, should technically be excepted, not reserved: *Doe* v. *Lock*, 2 Ad. & El. 705.

2. A reservation can not extend to a component part of the land demised or granted; that is the office of an exception: *Fancy* v. *Scott*, 2 Mann. & Ry. 335.

3. Conveyance of land subject to reservation of mines and mining powers: *Mordue* v. *Durham*, L. R., 8 C. P. 336.

4. Reservation of "mines and minerals" includes "China clay": *Hext* v. *Gill*, L. R., 7 Ch. App. 699; 3 Moak, 574. But not oil; see note 8, 10 M. R. 421.

5. Inclosure act held by necessary implication to reserve to the lord a right to minerals: *Micklethwait* v. *Winter*, 6 Ex. 644.

6. Reservation construed as to surface support: *Harris* v. *Ryding*, 5 M. & W. 60.

7. Reservation of minerals held to include freestone got by underground mining: *Bell* v. *Wilson*, 10 M. R. 415.

8. Reservation of minerals with way-leave construed: *Dand* v. *Kingscote*, 6 M. & W. 174.

9. Where there is a right reserved, as of minerals, all things depending on that right and necessary for the obtaining it, are reserved also: *Cardigan* v. *Armitage*, 3 Dow. & Ry. 414; 2 B. & C. 207.

10. Where the Crown has only a bare reservation of royal mines it can not grant a license to any person to come upon another man's estate, and search for such mines. But when the mines are once opened, it can restrain the owner of the soil from working them, and can either itself work the mines or grant a license for others to work them: *Lyddal* v. *Weston*, 2 Atk. 19.

11. Conditional reservation construed: *McBee* v. *Loftis*, 3 M. R. 222.

12. Reservation of mines in Crown grant construed: *McMahon* v. *Burton*, 2 Allen, (N. B.) 321.

13. Reservation and exception distinguished: *Sloan* v. *Lawrence Furnace Co.*, 5 M. R. 659.

14. Mines *reserved* can not be worked so as to drain springs *granted*: *Whitehead* v. *Parks*, 2 H. & N. 870.

15. Construction of a reservation of "quarries," omitting the word "mines" usually found in that connection. The rule *expressio unius* applied: *Denison* v. *Holiday*, 3 H. & N. 670; 1 Id. 631.

16. Reservation of quarry until the expiration of a certain lease; effect

of surrender of the lease before end of term: *Farnum* v. *Platt*, 8 M. R. 330.

17. Construction of deed where the reservation is made by reference to the reserving clause in another deed: *French* v. *Carhart*, 1 N. Y. 96.

SIMS ET AL. v. SMITH ET AL.

(7 California, 148. Supreme Court, 1857.)

[1] **Right of mining claim to bed of stream.** The prior locator of a mining claim, on the bank of a stream, has the right to the use of the bed of the stream for the purpose of working his claim; and any subsequent erection, dam or embankment, which will turn the water back upon such claim, or hinder it from being worked with flumes, or other necessary appliances, is an encroachment upon the rights of such party, and entitles him to the recovery of damages.

Appeal from the District Court of the Fourteenth Judicial District, County of Sierra.

This was an action brought by the plaintiffs, the owners of certain mining claims on Rabbit creek, to recover damages for injuries caused to their claims by the flowing back of the water of the stream so as prevent the tailings of their sluices from being carried off, caused by the erection of a dam by the defendants across the stream, at a point lower down. It appeared on trial, that the plaintiffs were the first locators. The defendants asked Lester, a witness, a question relative to the grade of descent of the river, which was not allowed to be answered, the damages consequent upon the erection of the dam, and the priority of location of the parties, having been established.

The second instruction asked for by the plaintiffs, and given by the court, was as follows:

"If the jury believe, from the testimony, that the plaintiffs, or their predecessors, were first to locate their mining claims, set forth in the complaint, and that they have not abandoned the same, and that the defendants have built and maintained a dam across Rabbit creek, below, whereby the plaintiffs are hindered, delayed and injured in the working and mining of their mining claims, set forth in their complaint, from April, 1854, to October, 1856; then, to the extent of that injury, the plaintiffs are entitled to recover, and the jury should so find."

To which instruction defendants excepted.

[1] *Nelson* v. *O'Neal*, 4 M. R. 275.

The jury found a verdict for plaintiffs, and judgment was entered accordingly.

Defendants appealed.

E. D. BAKER, for appellants.

DUNN and MEREDITH, for respondents.

No briefs on file.

MURRAY, C. J., delivered the opinion of the court, TERRY, J., concurring.

This case ought properly to be dismissed, as the appellant has not furnished the court with a brief or abstract of the record, and we can not, in reason, be expected to do the work of counsel in cases brought here on appeal. There is, however, a paper on file, which may have been intended as an assignment of errors.

The first point relied on is the refusal of the court to permit the witness, Lester, to answer the second interrogatory propounded to him. This question might have been allowed without any impropriety, but, as it is not shown that the question had any particular reference to the case, and it also appearing that the plaintiffs were the prior locators, there was no error in excluding the answer.

In fact, it was not material how high the tailings from the plaintiffs' claim would have accumulated at the defendants' dam, as they were entitled to the use of the bed of the stream for the purpose of fluming or working their claim, and the erection of the dam was an interference with their rights.

The second instruction given by the court is correct. Where parties have located mining claims upon the bank of a creek or stream, and are using the bed of said stream for the purpose of working their claims, any subsequent erection, dam, or embankment, which will turn the water back upon such claims, or hinder them from being worked with flumes, or other necessary means or appliances, is an encroachment upon the rights of said parties, and they are entitled to recover for the damages consequent on such obstruction.

Judgment affirmed.

BRAXON ET AL. V. BRESSLER.

(64 Illinois, 488. Supreme Court, 1872.)

Replevin lies for stone taken from bed of stream. By the principles of the common law in force in the State of Illinois, a river, though navigable in fact, is not so in law, if it is above the point where the tide ebbs and flows. In such a case the bed of the stream belongs to the riparian owners, each of whom owns to the middle or thread of the stream, and stone or gravel taken therefrom without the consent of the adjoining proprietor, may be replevied by him.

Easement for navigation gives no right to remove the soil. The easement or right of using a navigable river as a highway does not give the right to quarry rock or remove the gravel or soil, except so far as necessary for the enjoyment of such easement.

[1] **Grants bordering on rivers.** Grants of land bounded on rivers, or upon their margins, above tide water, carry the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the edge of the river.

Appeal from the Circuit Court of Whiteside county; the Hon. W. W. HEATON, Judge, presiding.

J. E. MCPHERRAN, for the appellants.

KILGOUR & MANAHAN, for the appellee.

THORNTON, J., delivered the opinion of the court.

The north bank of Rock river is one of the boundaries of plaintiffs' land; and at the point where the stone replevied were taken by the defendant the river is 1,300 or 1,400 feet in width. The stone were quarried from 300 to 500 feet from the north bank of, and in the river.

It is conceded that Rock river is a navigable stream; and it is above tide water. The only question presented is the extent of the title of the plaintiffs, if any, beyond the margin of the river.

The common law is in force in this State, and its principles must control in the elucidation of the question.

Though a river may be navigable in fact, it is not so in a

[1] *Sleeper* v. *Laconia*, 60 N. H. 201; 49 Am. R. 311; cited *Piper* v. *Connelly*, 108 Ill. 651; *Brandt* v. *McKeever*, 9 M. R. 216.

common law sense, where it is above the point where the tide ebbs and flows. Above this point the bed of the stream belongs to the riparian owners. If different persons own the lands on the opposite banks, each one possesses the right to the middle or thread of the stream.

This principle must be applied to Rock river, as the tide does not ebb and flow therein, and there is no language in the deeds of the plaintiffs which excludes the intermediate space between the edge of the stream and its thread, from the grant.

The navigability in fact, of the stream above tide water, does not affect the title of the riparian owner in the right to protection against a trespasser. Where the river is navigable, the public have an easement or a right of passage upon it as a highway, but not the right to move the rock, gravel or soil, except as necessary to the enjoyment of the easement. No individual can appropriate to his own use the bed of the stream, without the consent of the adjoining proprietor.

The principles of the English law, which must govern this court, have been so fully and clearly settled that any elaboration of them is unnecessary.

In *Wright* v. *Howard*, 1 Sim. & Stu. 190, the vice-chancellor said: "*Prima facie* the proprietor of each bank of a stream is the proprietor of half the land covered by the stream."

Chancellor Kent declares it as settled that grants of land bounded on rivers, or upon their margins, above tide water, carry the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the edge of the river. 3 Vol. Com. 426.

In *Jones* v. *Soulard*, 24 How. 41, the Supreme Court of the United States applied the same principle to the Mississippi river, at the city of St. Louis. It was held as a general rule, too well settled, as part of the American and English law of real property, to be open to discussion, that all grants of land bounded by fresh water rivers, where the expressions designate the water line are general, confer the proprietorship on the grantee to the middle of the stream.

Such has been the rule in this State for over thirty years.

In *Middleton* v. *Pritchard*, 3 Scam. 510, decided in 1842,

it was held that the Mississippi was not a navigable stream, by the common law, and that a grant of land bounded upon it entitled the grantee to all islands lying between the mainland and the center thread of the current.

The same doctrine was declared in *The Board of Trustees* v. *Haven*, 5 Gilman, 548, and in a case between the same parties in 11 Ill. 554.

In the case of *The City of Chicago* v. *Laflin*, 49 Ill. 177, the same principle was announced, and the former cases were cited and approved.

Reference is also made to the following authorities, as sustaining the view taken by this court: *Adams* v. *Pease*, 2 Conn. 481; *Brown* v. *Chadbourne*, 31 Maine, 9; *Com.* v. *Alger*, 7 Cush. 53; *Storer* v. *Freeman*, 6 Mass. 439; *Claremont* v. *Carlton*, 2 N. H. 369; *People* v. *Canal Appraisers*, 13 Wendell, 355; *Stuart* v. *Clark*, 2 Swan, 9; *Lorman* v. *Benson*, 8 Mich. 18; *Walker* v. *Shepardson*, 5 Wis. 486; *Morgan* v. *Reading*, 3 Smedes & Marshall, 366; *Commissioners* v. *Withers*, 29 Miss. 29; *Morgan* v. *Livingston*, 6 Martin (La.), 216; *Gavit* v. *Chambers*, 3 Ohio, 495.

We have thus referred to numerous adjudged cases, because we are asked to abrogate a rule which has become a law of real property, and to place ourselves in opposition to the long and uninterrupted decisions of this court, and of more than three fourths of the courts of the other States, on account of a comparatively recent opinion of the Supreme Court of the United States.

In the case of *Railroad Co.* v. *Schurmeir*, 7 Wall. 272, that court, while admitting the common law doctrine to be correct in all jurisdictions where its rules prevail, said, in regard to a tract of land bordering upon the Mississippi river, that the doctrine did not apply, and that the acts of Congress declaring certain rivers navigable intended to provide that the common law rules of riparian ownership should only apply to streams not made navigable by act of Congress, in certain territory, and where the river had been declared to be navigable the title to lands bordering upon it should stop at the stream. The reasoning was not, perhaps, necessary to the decision made. The complainant alleged that the corporation was engaged in the extension and construction of its road over and

along a public street and landing in front of his premises, so that the landing could not be used for the purposes for which it was dedicated, and the prayer was, that the company be enjoined from the prosecution of the work. The decree of the court below sustaining the injunction was affirmed. The effect of the decision is, that riparian proprietors have the right to construct suitable landings, and use them for the convenience of commerce and navigation, though their title may be limited to the margin of the stream.

The court bases its opinion as to the extent of the boundary of a riparian proprietor, whose lands border upon a stream, navigable in fact, though above tide water, upon the following provision of the act of Congress of the 17th of May, 1796: "All navigable streams within the territory to be disposed of shall be deemed to be, and remain, public highways; and in all cases where the opposite banks of any stream, not navigable, shall belong to different persons, the stream and the bed thereof shall be common to both."

The last sentence has no bearing upon this case, for it is admitted that Rock river is a navigable stream. What is the meaning of the language that navigable rivers shall be deemed to be and remain public highways? The intention was that the river navigable in fact should be subject to the public easement; that the public should enjoy its free and uninterrupted navigation, unobstructed by dams, bridges or other structure which might materially impede its commerce; that it should be a common highway for every vessel which might float upon its waters. The intention of Congress was only to reserve the use of the river. This the public could possess without interference with the riparian owner, and the latter could have his right to the bed of the stream without any interference with the *jus publicum*.

The peace of society and the security of personal rights demand a legal recognition of ownership of the beds of the streams within the States as well as the water. Wrongs and trespasses must often be committed. Contests and litigation as to the rock, as in this case, and frequently as to the gravel and soil, must arise. The riparian owner should have a remedy against the wrongdoer. He gains by alluvion and loses by avulsion, and for his full security should have the right to protect the bed of the stream from individual trespasses.

The opposite view vests the fee in the United States, and makes them the proprietor of every navigable stream in the State. Their interposition in the prosecution of trespasses would be an intermeddling with the policy of the State, and would be perilous to its sovereignty. The common law rule would best subserve the public peace and protect from violence.

If the decision in the case of *Railroad Co.* v. *Schurmeir* is to be regarded as authoritative, then it is in direct conflict with the case of *Jones* v. *Soulard, supra.* In the latter case it was distinctly held that from the days of Sir Matthew Hale to the time when the decision was rendered, in 1860, the common law rule prevailed as to fresh water rivers; that the size of the river did not alter the rule, and to hold that it did would be a dangerous tampering with riparian rights, involving litigation concerning the size of rivers as matter of fact, rather than proceeding on established principles of law. When this decision was made, the act of Congress of 1796 had been in force over sixty years.

We prefer to follow this decision, as it is in accord with right and our own decisions. We shall take as our exemplar the same court. In *Gelpcke* v. *City of Dubuque*, 1 Wallace, 175, the Supreme Court of Iowa, having overruled a number of its previous decisions, the Supreme Court of the United States refused to follow the latter case, and remarked: "It can not be expected that this court will follow every such oscillation, from whatever cause arising, that may possibly occur."

The rule that where a stream is not subject to the ebb and flow of the tide, its bed shall be deemed the property of the owner of the soil bounding upon its border, has been too long and firmly settled in this State to be disturbed without unsettling titles and unhinging all faith and respect and confidence in the decisions of the courts. Property is purchased on the faith of the stability of decisions of the courts, and it is essential that questions, when once decided, should no longer be considered open, or doubtful, or subject to change. Legislation can only affect the future, but when courts vacillate and overturn their own decisions the evils may be incalculable. They operate retrospectively, and may often disturb rights which should be regarded as certain and fixed.

We are of opinion that the plaintiffs owned the bed of the stream to its center, and were entitled to recover for the rock taken therefrom.

The judgment is reversed and the cause remanded.

1. A crown grant of coal mines held to include coal lying under the foreshore of the estuary of the river Dee: *Att'y Gen.* v. *Hanmer*, 27 L. J. Ch. 837.

2. A party who has entered land is entitled to the rights of a riparian proprietor, although patent has not issued: *Union Co.* v. *Dangberg*, 8 M. R. 113.

3. The crown is entitled to "the soil of the sea;" to coal mines under the sea to the line of average medium high tides: *Att'y Gen.* v. *Chambers*, 2 Eq. Rep. 1195.

4. Shore between tides treated as open to location by mining claims: *People ex rel. Dead Whale M. Co.* v. *Morrill*, 26 Cal. 336.

5. Mining for ashphaltum between high and tow tides: *More* v. *Massini*, 37 Cal. 432.

6. The right of the riparian proprietor is not to be measured by the necessities of his business (operating lead mines): *Wheatley* v. *Chrisman*, 11 M. R. 24. But he has the right to use the stream as it flows: *Pool* v. *Lewis*, 5 M. R. 523.

7. Right of placer miner to channel of the gulch: *Stone* v. *Bumpus*, 4 M. R. 271.

8. Use of water for irrigation is a use necessarily injurious to the rights of riparian proprietors: *Sampson* v. *Hoddinott*, 1 C. B. N. S. 590.

9. The rights of a riparian proprietor do not attach to artificial streams: *Id.*

10. A riparian owner has no right to maintain a dam so as to set the water back to a higher level than ordinary water: *Ames* v. *Cannon River Co.*, 27 Minn. 245.

11. Rights of riparian proprietors as occupants and appropriators, under the act of July 26, 1872, considered: *Jones* v. *Adams*, 6 Pac. 442.

12. The diversion of water not producing perceptible injury, will not be enjoined at the suit of a riparian owner: *Moore* v. *Clear Lake Water Works*, 5 Pac. 494.

PATTERSON v. THE KEYSTONE MINING CO.

(23 California, 575. Supreme Court, 1863.)

[1] **Sale of claim by parol.** A *bona fide* parol sale of a mining claim, accompanied by a delivery of possession, is valid as against a subsequent sale of the same grantor, made by deed in writing duly acknowledged.

[2] **What is sufficient possession of mining claim.** The possession of one claiming under a parol sale, or unrecorded bill of sale, in order to impart notice to a subsequent purchaser, need not be evidenced by an actual inclosure or anything equivalent thereto

Appeal from the District Court, Sixteenth Judicial District, Calaveras County.

One Callahan, with nineteen others, in August, 1861, located a copper ledge in Calaveras County, three thousand feet in length. The interest of Callahan in the claim was one twentieth, and he paid assessments on his interest in August and September, 1860. One Blatchly was also a member of the company. In November, 1860, five of the original locators were incorporated for the purpose of working the ledge, under the name of the "Keystone Company." Certificates of stock were issued by the corporation to the different claimants. Blatchly claimed the interest of Callahan by an alleged parol sale, made in October, 1860, and the corporation recognized and treated Blatchly as the owner. The corporation had been working the claim from the time of its formation up to the commencement of this suit. In June, 1861, Callahan, who had not attempted to exercise any control over the claim after October, 1860, executed to plaintiff, Patterson, a deed duly acknowledged of an undivided one-twentieth of the claim. Patterson demanded of the corporation possession of the interest, was refused, and July 20th, 1861, commenced this action to recover possession. Plaintiff recovered judgment in the district court, and defendants appealed.

WILLIAM S. WOOD, for appellants.

[1] See note 14, 3 M. R. 415; S. C., post, 171.

[2] *Attwood* v. *Fricot*, 2 M. R. 30 ; and *English* v. *Johnson*, 12 M. R. 202, affirmed.

H. O. BEATTY, for respondent.

CROCKER, J., delivered the opinion of the court, NORTON, J., concurring.

This is an action to recover the possession of the undivided one twentieth of a mining claim. The plaintiff claimed title under a deed executed by one Callahan, one of the original locators of the claim, dated June 3, 1861. The defendants claim title under Callahan by virtue of an alleged sale by parol and delivery of possession, prior to the date of the plaintiff's deed. The court instructed the jury "That the possession of the defendants under an unrecorded deed or bill of sale from Callahan, in order to constitute notice of this claim to the plaintiff so as to invalidate or defeat his title, must have been a *possessio pedis*, actual *bona fide* possession, consistent with defendant's title, and that this possession must be evidenced by an actual inclosure or something equivalent, as showing the extent and the fact of the defendant's dominion and control of the premises." The appellants assign this instruction as error. The rule of law defining what will constitute possession of a mining claim was fully and clearly laid down by this court in the cases of *Attwood* v. *Fricot*, 17 Cal. 37, and *English* v. *Johnson*, Id. 107. The instruction given in this case clearly conflicts with the rule laid down in those cases. The validity of parol sales of mining claims has been fully established by this court in the cases of *Jackson* v. *Feather River Co.*, 14 Cal. 22; *Table Mountain Co.* v. *Stranahan*, 20 Id. 198; *Gatewood* v. *McLaughlin*, 23 Id. 178.

The judgment is therefore reversed, and the cause remanded for a new trial.

[1] PATTERSON v. THE KEYSTONE MINING CO.

(30 California, 360. Supreme Court, 1866.)

Verbal sale of copper lode prior to 1863. Prior to the act of April 13, 1860, title to a mining claim would pass by a verbal sale if accompanied by an actual transfer of the possession. This statute applied in terms only to gold mines until, by amendment of 1863, it was extended to mines generally. A verbal sale, therefore, of a copper vein, prior to 1863, would pass title.

[2] **Verbal sale proved under averment of sale in writing.** In an action to recover an interest in a lode the defendant answered claiming title by virtue of a sale in writing: *Held*, that the defendant was not by this allegation precluded from proving a verbal sale, the allegation being an averment of evidence not going to make a material issue.

Instrument material if existent. A defendant claiming title under a written bill of sale must produce it or establish its loss before resorting to proof of its contents or proof of a verbal sale.

Insufficient proof of loss. Proof of the loss of a written instrument is not established by showing that of three persons who may have it, two are unable to find it; inquiry should be made of the third.

[3] **A verbal power is sufficient** to authorize an agent to sign the name of the grantor to a bill of sale of a mining claim, where the grantor has first agreed in person with the grantee upon the terms of sale.

The possession of a claim by a company composed of several persons is the possession by each one of its members of his individual share.

Transfer of single share among common owners. The withdrawal of one member from all participation in the affairs of a mining company, another taking his place and representing the interest, is a change of possession as to that interest.

Party bound by statement of witness. Where the witness called by a party to prove a transfer says that such transfer was in writing, the party is bound by the statement of the witness and must produce the writing or account for it.

Inconsistent positions of counsel. Counsel can not claim that there was a written sale so as to exclude proof of a verbal sale and at the same time insist that such alleged sale in writing was void.

Appeal from the District Court, Eleventh Judicial District, Calaveras County.

In the month of August, 1860, Wm. L. Callahan, with nineteen others, located a copper vein or lode in Calaveras county,

[1] S. C., 13 M. R. 169.

[2] *Terpening* v. *Holton*, 9 Colo. 306.

[3] See *Tilton* v. *Cofield*, 2 Colo. 392.

and named it the Keystone Claim. Callahan, at the time of the location, owned an undivided one-twentieth of the mine.

On the 27th of November, 1860, the Keystone Mining Company was incorporated, and for some four weeks before the act of incorporation, Ambrose Blatchly had claimed to own and represent Callahan's interest, and became one of the corporators, and received certificates of stock for the same, and delivered possession of the same to the corporation for the stock. On the 3d day of June, 1861, Callahan executed to plaintiff, Patterson, a deed of all his right, title, and interest in the claim. The plaintiff claimed under this deed. On the 20th day of July, 1861, Patterson commenced an action to recover possession of the one-twentieth which formerly belonged to Callahan. The defendant claimed that in October, 1860, Callahan had sold his interest to Blatchly, and that Blatchly had entered into possession and had delivered possession to the company.

On the trial T. W. Bean, a witness for the defendant, testified that in October, 1860, Callahan gave him verbal authority to sell his interest in the mine to Blatchly, and that he contracted with Blatchly for Callahan to sell him the same for one hundred and fifty dollars, and informed Callahan, who assented to the contract and told Bean to give Blatchly a bill of sale for the same in Callahan's name, as his attorney in fact, and that he then executed to Blatchly a bill of sale in the name of Callahan, as his attorney. The testimony was admitted, subject to all legal objections. The defendants then moved the court to strike out Bean's testimony, because a written sale was alleged in the answer, and because the alleged parol sale was void, and also because no authority was shown to execute the bill of sale, as a parol authority was insufficient for such a purpose. The court denied the motion, and defendant excepted. The defendant also moved the court to disregard the evidence concerning the contents of the bill of sale, because it was not shown to be lost. The court denied the motion, and defendant excepted.

The trial was by the court, and the court found as a fact that the sale from Callahan to Blatchly was by parol. The defendant recovered judgment, and plaintiff appealed.

The other facts are stated in the opinion of the court.

GEO. CADWALADER, for appellant.

H. P. BARBER, for respondent.

By the Court, SANDERSON, J.

I. It is settled that prior to the passage of the act of the 13th of April, (Stat. 1860, p. 175,) title to a mining claim would pass by a verbal sale, if accompanied by an actual transfer of the possession. This doctrine was first suggested in *Jackson* v. *Feather River Co.*, 14 Cal. 18, and formally announced in *Table Mountain Co.* v. *Stranahan*, 20 Cal. 198. It was subsequently affirmed in *Gatewood* v. *McLaughlin*, 23 Cal. 178, and in the present case when here on a former appeal (23 Cal. 575). In the case of *The Copper Hill Min. Co.* v. *Spencer*, 25 Cal. 18, we held that this rule applies only to cases were the vendor is in the actual possession and can deliver it to the vendee, and not to cases where there is an adverse possession in a third party. But in neither of these cases was the effect of the act of 1860 considered. The question is important. Does not that act preclude verbal sales, and require them to be made in writing? Prior to its passage, it is well settled that a written instrument was not necessary. Unless a change in that respect was desired, no legislation was needed. Yet the act was passed and it was provided that "conveyances of mining claims may be evidenced by bills of sale," etc. Does not "may" mean must or shall? The first section of the act concerning conveyances provides that "conveyances of lands or of any estate or interest therein may be made," etc. Here the word "may" means must or shall; and if so, why is not the same true of the former? It may be doubted whether the rule in *Table Mountain Tunnel Company* v. *Stranahan* is not entirely abrogated by the act of 1860; but we reserve the question, since its determination is not necessarily involved in this case.

By the second section, the operation of the act was limited to gold mines, and did not therefore embrace mines of the character of the one in suit. It is true this section was repealed in 1863 (Stat. p. 98), and the operation of the act thereby extended to all kinds of mines; but the sales from Callahan to Blatchly, and from the latter to the defendant, were made while the second section was still in force, and hence their

validity must be determined by the rule in *Table Mountain Tunnel Co.* v. *Stranahan.* Under the law, therefore, applicable to this case, the sales from Callahan to Blatchly and from the latter to the defendant were good, and passed the title, if accompanied by a transfer of the possession, if merely verbal, which, however, as will be seen hereafter, does not seem to have been the case with the former.

II. The defendant having alleged in his answer that the sale from Callahan to Blatchly was in writing, it is claimed that the defendant was thereby precluded from proving a verbal sale. In this respect we think the learned counsel for the appellant is in error. The allegation, so far as it avers that the sale was by a written instrument, is an averment of the evidence of the fact of sale, and would have been stricken out on motion for that reason: *Green* v. *Palmer*, 15 Cal. 411. It so far presented no issue. The only issue made by the allegation was as to the fact of sale. How the sale was made, whether by word of mouth or by a written instrument, was merely a matter of evidence, and not an issuable fact. If the sale was, in fact, evidenced by a written instrument, the defendant was undoubtedly bound to prove it by producing the instrument, not because of any rule of pleading, but because of the rule of evidence which requires the production of the best evidence of which the nature of the case admits. Suppose that at the time the answer was prepared the defendant was informed and believed that the sale was made in writing, but it subsequently and upon further inquiry turned out that the defendant was mistaken, and in fact, the sale was a verbal one, would the defendant have been precluded by its false averment that it was in writing, from proving the verbal sale? Undoubtedly not, for whether it was in writing or not is not material, and only affects the mode of proof; for the averment that it was in writing might be stricken out without leaving the answer insufficient, which is the test whether the matter alleged is material or not. The question as to the defendant's right to introduce parol evidence of the sale could be made only upon demurrer to such evidence when offered, and in the solution of that question the pleadings could not be consulted as conclusive.

III. But it appears from the evidence of the defendant that there was a written bill of sale. The defendant was

therefore bound to produce it or establish its loss before resorting to oral testimony. This was not done, and the court erred in overruling the plaintiff's objection to the oral testimony for that reason: *Crary* v. *Campbell*, 24 Cal. 634. The testimony shows that the bill of sale was in the possession of defendant's witnesses and counsel at the former trial of the case. Bean testifies that he then and there, while on the witness stand as a witness, delivered it to A. P. Dudley, of counsel for defendant. Dudley testifies that he delivered it to Bean or Mandeville, and he thinks the former. Bean, however, on being recalled, stated that it was not re-delivered to him by Dudley. Both Bean and Dudley stated that they had made thorough search among their papers, but could not find it. Here the showing as to the loss stops, and is manifestly insufficient. It leaves the missing document in all probability in the possession of Mandeville, who was not called upon to give an account of its further fate. Mandeville being the last person shown to have it in his possession, inquiry should have been made of him in order to lay a foundation for the introduction of secondary evidence as to its contents.

It will not do to say that the bill of sale was not the act of Callahan, because Bean, who executed it as his attorney in fact, only had a verbal power, and also acted as the agent of Blatchly in negotiating the sale with Callahan. A verbal power was sufficient to authorize Bean to sign Callahan's name to an instrument of that character, and Callahan having agreed in person upon the terms of the sale, it can not be said that Bean was representing both buyer and seller.

There having been a bill of sale, the question as to whether there was a change of possession within the rule in *Table Mountain Tunnel Company* v. *Stranahan* as to verbal sales becomes immaterial. But in view of the fact that another trial may be had, we deem it proper to say that the possession of the company was the possession of each of its members, and the withdrawal of Callahan from any further participation in the affairs of the company, and Blatchly's taking his place and representing the interest or share in question, was all the change of possession which could take place under the circumstances of the case, and satisfies the rule in *Table Mountain Tunnel Company* v. *Stranahan*.

Before leaving the case it is proper to add that as to the fact whether Callahan gave Bean verbal power to sign his name to the bill of sale, the testimony is conflicting. Bean testifies that he did, but Callahan testifies that he did not. The court did not find the fact directly either way. But Bean was a witness for the defendant, and the defendant was therefore bound by his statement on the question of primary and secondary evidence. At the trial, counsel for the plaintiff seem to have been more or less under the influence of cross purposes. It seems to have been claimed that the defendant must produce the bill of sale, and yet that if it was produced, it would prove nothing, because Bean had no power to execute it for Callahan; which apparent inconsistency is, in part, explained by the fact that they also claimed that a verbal sale would not pass the title, and hence if the bill of sale was void for want of power in Bean, the defendant's title would fail. If Bean had no power, the bill of sale was not the act of Callahan, and there was but a verbal sale, and it was competent for the defendant to prove it as such, without any showing as to the bill of sale. It being now determined that a verbal sale would pass the title, on another trial counsel must take one horn or the other of the dilemma. There either was a bill of sale which passed the title or there was not; and whether there was or not depends, as the evidence now stands, upon the fact whether there was a verbal power from Callahan to Bean to execute it in his name. Counsel will not be allowed to claim that there was a bill of sale, but no power in Bean to make it.

Judgment reversed, and a new trial ordered.

BIGLEY v. RISHER & WILSON.

(63 Pennsylvania State, 152. Supreme Court, 1869.)

[1] **No delivery and no price fixed, no sale.** In an action for the price of a boat laden with coal, it appeared that there had been no actual delivery or possession taken by the alleged vendee and there was no specification of price. *Held*, that there was no sale.

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[1] Sufficient delivery of coal: *Boswell* v. *Green*, 2 M. R. 363; of charcoal in pit: *Tognini* v. *Kyle*, 17 Nev. 209.

Sale defined. Sale means a contract to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought.

Error to the District Court of Allegheny County.

This was an action of assumpsit brought to July term, 1868, by Ithamar D. Risher and Joseph Wilson, partners, as Risher & Wilson, against Nicholas J. Bigley. The plaintiffs declared in all the common counts. Their claim was for a boat and cargo of coal. The boat was lying at the plaintiffs' works on the Monongahela river, and remained in the possession of the plaintiffs. After the alleged sale there was a break-up of the ice in the river, which carried the boat away from its moorings; it was wrecked and both boat and cargo were lost. The questions which were considered in the court below were: Whether there was a contract of sale: Whether there was a delivery: And whether there was negligence in the plaintiffs in their care of the boat. The plaintiffs gave evidence by John C. Risher, a brother of one of the plaintiffs, that after he heard of the accident he went to the defendant's office and informed him of it; he said to witness, "go on up and do what I could; that he considered the boat his; that he had bought it of my brother."

At a conversation some weeks afterward, the plaintiff Risher said to defendant he had come to know whether, in case plaintiff should raise the boat, defendant would pay the balance; defendant said he did not wish to be identified with the boat, but did not care to give him a little, a few hundred dollars; said it was a pity he had not taken the boat away before the accident; "according to what I understood was the agreement, it would have saved all this trouble."

William O'Neill testified that defendant said to him after the accident, that he had bought the boat and if she was properly tied he expected to pay for her.

For defendant. John Musgrove, defendant's clerk, testified that some time before the accident Risher came to the defendant to sell the boat; defendant asked Risher what he wanted for the boat. Risher asked what he would give; defendant wanted Risher to name figures; Risher said he

would let him know in a day or two what the figures would be, and left. Risher and defendant were next together about the boat at the time spoken of by J. C. Risher. Witness testified to what took place then somewhat different from Risher. There was other evidence bearing upon the question of sale, but none showing that any price had been agreed on. There was much evidence as to delivery, but it was undisputed, that no *actual* delivery of the boat was made to the defendant and that he never took possession of it.

The first point of the defendant with its answer is as follows:

"The evidence does not show any such concluded bargain or contract between the parties as passed the title to the defendant to the boat in controversy."

"Refused. We leave this as a question of fact to be passed upon and determined by the jury."

The court, Kirkpatrick, J., among other things charged:

* * * "Was there a sale of this boat from the plaintiffs to the defendant? If so, was there also a delivery such as the law requires of the articles from the buyer to the seller? Both are requisites. It would seem to be conceded—but this is for you—there was a sale. The plaintiffs have given you their version of it, the defendant his. The plaintiffs claim that thus and so were the conditions of the sale, whilst the defendant claims that it was something else. Do they agree substantially, and if not, wherein do they differ, and are the differences material and vital?

"If these differences in allegation and proof are reconcilable, you must reconcile them. If irreconcilable, you must receive and believe what in your conscientious judgment is entitled to belief, and reject whatever and all else that does not so commend itself. As already intimated, you are 'a law unto yourselves,' answerable only to your own consciences for all and whatever you may regard as false, or receive as true, in this case."

"Again: the plaintiffs claim that they not only sold, but delivered the boat to the defendant. The defendant asserts that they did not. * * *

"We tell you simply what is necessary to be done in order to constitute a good and sufficient delivery in law: it is for you to say whether or not these things have been done, and

all these essentials complied with. If they have, in your judgment, then there was a delivery, and your verdict must be for the plaintiffs; if not, your verdict must be for the defendant. In so determining, gentlemen, you must, however, go a step further and consider the character of the article to be delivered. A man could not deliver a ship at sea as easily as a wagon upon land. Nor could one deliver timber standing upon his farm with the same care and completeness, so to speak, that he could deliver a horse in his stable. You must, in determining the question whether all was done that could be done, take into consideration the nature, character and bulk of the article, bearing further in mind that these plaintiffs were not bound—nor is it so contended—to remove the boat, or take it elsewhere than where it was lying at the time of the sale. In other words, it is not contended that the plaintiffs were bound to take this boat anywhere in order to give the defendant possession; and, hence, the only question for your determination will be, did they do all they could have done to give possession of her as she there lay, or was there anything else in your judgment that they should have done in order to accomplish a perfect delivery? If they left anything undone which, in your conscientious opinion they ought to have done, there was no delivery in law, and we so instruct you, and they can not recover; but if they did all that could have been required of them, upon an examination of all the circumstances, and taking into consideration the nature, character, bulk, condition and location of the boat, then they are entitled to recover, and your verdict will be for them in such amount as the evidence in the case warrants. This we instruct you is the true test of delivery, and by this test you will determine in this regard and the particular facts of this case."

* * *

The verdict was for the plaintiffs for $2,508.

The defendant took a writ of error and assigned for error (amongst others) the portions of the charge given above and the answer to the defendant's first point.

M. W. ACHESON, for plaintiff in error.

R. & S. WOODS, for defendants in error.

The opinion of the court was delivered November 11, 1869, by READ, J

The leading case, in Pennsylvania, as to what constitutes a complete sale of a chattel, as between the parties, is *Scott* v. *Wells*, 6 W. & S. 357, in which the law is clearly laid down in the charge of Judge Jones to the jury, and in the opinion of Chief Justice Gibson. "I grant," says Chief Justice Gibson, "that a sale may be fatally defective in its members; and that by the civil, as well as the common law, the specification of a price is necessary to constitute it."

In the case before us, there was no actual delivery to and possession of, the coal-boat taken by the defendant, and no specification of the price is to be found anywhere in the evidence. "We did not prove the price," say the plaintiff's counsel, and the boat lying in the plaintiff's harbor, and in his custody, from which it had not been removed, was swept away and lost before this essential member, the price, was fixed or specified.

It is clear from the judge's charge and his refusal of the defendant's first point, that he considered there was a sale concluded, and that the only question was, was there a delivery? "It would seem to be conceded—but this is for you—there was a sale." This was not conceded by the defendant, but denied, and yet the charge proceeds upon this hypothesis. There was a fatal defect in this so-called sale, there was no price, and so the court should have informed the jury. They should have said if there is no price specified and proved, there is no sale.

"Sale," said Mr. Justice Wayne in *Williamson* v. *Berry*, 8 How. 544, "is a word of precise legal import in law and in equity. It means at all times, a contract between parties to pass rights of property for money which the buyer pays, or promises to pay to the seller, for the thing bought and sold." *Huthmacher* v. *Harris*, 2 Wright, 498; 1 Harris, 148; Hilliard's Law of Sales of Personal Property, p. 1230.

The evidence does not show any such concluded bargain or contract between the parties, as passed the title to the boat and coal in controversy to the defendant.

Judgment reversed and venire de novo awarded.

1. Instances where the consideration is made dependent on the produce of the mine: *Bainbridge* v. *Gehring*, 3 M. R. 40; *Hoeveler* v. *Mugele*, 15 M. R. — ; *Ray* v. *Hodge*, Id. —.

2. The word "sold" implies a consideration: *Reaves* v. *Ore Knob Co.*, 3 M. R. 369.

3. Buyer must perform his part before he can claim damages: *Pennsylvania Co.* v. *Ryan*, 107 Ill. 226.

4. There is no mutuality in a contract to supply all the coal vendee may order where the buyer does not bind himself to order a certain quantity: *Campbell* v. *Lambert*, 36 La. 35; 51 Am. Rep. 1.

5. Agreement to take *all* the coke produced—in connection with stipulation for certain qu ntities: *Eastern Counties R'y* v. *Philipson*, 16 Com. B. 2.

6. Sufficient tender of coal: *Coit* v. *Houston*, 3 Johns. C. 243.

7. Oil delivered must conform to sample, though contract silent as to sample: *Borrowman* v. *Rossel*, 16 Com. B. N. S. 58.

8. Coal sold to be p.id for on delivery of b'll of lading is vendor's property in transit: *Moakes* v. *Nicolson*, 19 Com. B. N. S. 290.

See CONTRACT, DELIVERY, VENDOR AND PURCHASER.

FINDLAY V. SMITH ET UX. ET AL.

(6 Munford, 134. Supreme Court of Appeals of Virginia, 1818.)

Not waste to dig new wells. Tenant for life may dig a new salt well communicating with the same fountain, without restraint.

Unlimited use, including timber. Devise of salt works for life, remainder over—construed to allow the devisee to make unlimited use of the salt works, saline water and the wood land supplying them with fuel.

Circumstances of new country. The law of waste must be accommodated to the circumstances of a new and unsettled country.

Elizabeth Findlay, an infant, by Alexander Findlay, her guardian, exhibited a bill in the Superior Court of Chancery for the Richmond district, stating that she was the niece and heir at law of William King, late of Abingdon, county of Washington, who died in 1808, seized and possessed, among other estate, of certain salt works of great value, in that county; having first made and duly published his last will, in which, among other clauses, was the following: "And during the lifetime of my wife, it is my intention and request that William Trigg, James King and her do carry on my business in partnership, both salt works and merchandising, each equal shares; and that, in consideration of the use of my capital, they pay out of the same certain legacies," thereinafter bequeathed; that William Trigg and James King took under the said devise; but Mary, the testator's widow, renounced the will, and was thereupon regularly endowed of his real estate, and in particular, of the said salt works and wood lands contiguous thereto; that she with the said William Trigg and James King took possession thereof, and carried them on jointly for their common benefit; that the said Trigg and King were since dead, and their devisees and representatives carried on the said salt works in like manner; that the said Mary, the widow and doweress aforesaid, inter-married with Francis Smith, who, together with the said devisees and representatives, were made defendants to the bill; that the well from which the salt water was drawn was out of repair, and had so caved in, that the same quantity of water per day, as formerly, could not now be drawn with safety; that it still continued to cave in

and was likely to fall in entirely and be rendered useless, unless speedily repaired; that instead of making the necessary repairs, the present occupants had commenced the sinking a new well about forty feet from the old one, and of the same dimensions, intending (as they said), after getting below the level of the surface of the water in the old well, to excavate an horizontal communication between the old and new wells; but the complainants supposed them to be in search of a new vein of water, or that, by means of the new well communicating with the old, they might draw from the source which supplied the old well double the quantity of water, to convert which into salt would require twice the quantity of wood now consumed; that certainly both wells were intended to be used; that the wood used in carrying on the salt works was procured from the lands of the said William King, deceased, contiguous thereto, which lands were covered with fine groves of timber, but would be of little value when the timber was taken off, being generally too steep for cultivation; that the present occupants, tenants for life, had not the right to sink new wells for the purpose of obtaining salt water in greater quantities than was drawn at the time of the said King's death, or for the discovery of new veins or bodies of salt water, whereby the saline mineral might be entirely exhausted and the estate in remainder destroyed; nor to take more wood from the land than was necessary to manufacture the same quantity of salt per day as was made at that time; and that, if the said occupants should so draw a greater quantity of water, or consume a greater quantity of wood, they would commit waste.

The relief sought by the bill was, that the defendants be perpetually enjoined from digging the said new well, or any other well for obtaining salt water, and from taking more wood than enough to make 500 bushels of salt per day; and that they be compelled to repair the old well and keep it constantly in good condition.

Francis Smith and wife, by their answer, stated that the old well had so far gone to decay at the death of William King that all attempts made by the present occupants to repair it proved ineffectual; that in order to carry on the works a new well or some other mode of obtaining the water had become essentially necessary; that the object they had in view in sink-

ing the new well was to reach the present source or body of water, from which they intended to draw without being limited as to quantity, as they conceived that to be their right under the will. They admitted that wood was an expensive article in making of salt, but insisted on their right to take from the land as much wood as was necessary to convert into salt all the water that could be drawn, without any regard to the quantity or manner of obtaining it. As to keeping the well in repair, it was (they admitted) their duty while they occupied it, provided this could be done with reasonable care and diligence, but they denied that they were bound to do so at all hazards, and averred their belief that it was utterly impossible to secure the old well from caving in by any repairs that could now be made to it; that their digging a new well was so far from being waste that, on the contrary, they considered it an improvement to the freehold estate in remainder, more particularly as the present occupants would expend two or three thousand dollars for that purpose which they did not expect would ever be refunded to them. They denied the possibility of exhausting the saline mineral, stating sundry circumstances proving it to be inexhaustible, but if it were ever possible to exhaust it, they insisted upon their right to do so, the quantity of salt they were authorized to make being unlimited.

The other defendants, by a joint answer, contended for the same unlimited right; and further stated that the devise to Trigg and King was charged with the payment of legacies to the amount of $70,000; that the devisees derived but little if any profit from the use of the devisor's personal estate, as that had been exhausted in the payment of his debts; that the salt works were the only source from which funds could be drawn to pay those legacies; that the price of salt, both before and since William King's death, was very fluctuating; that there was another valuable salt work contiguous, belonging to General Francis Preston, which had been rented by the said King for a term of years, at the end of which the said Preston might have put his works into operation, and thus have glutted the market; that, as all those facts were known to the said King, he never could have intended, in the devise aforesaid, to limit the devisees in the quantity they might

choose to make; that they supposed the said devise was intended as a benefit to the devisees, who were his relations; but it would turn out entirely otherwise, if the construction contended for by the complainants were adopted; especially as the tenure by which the devisees held was altogether uncertain as to duration; that the expense of making salt was much greater now than in the lifetime of King, supplies being dearer and fuel more difficult to come at, and that the price had greatly diminished.

On hearing the bill, answers and exhibits, Chancellor Taylor's decree was that the bill be dismissed with costs, from which the complainant appealed.

LEIGH, for the appellant.

WICKHAM, for the appellees.

February 24, 1818, the judges delivered their opinions.

COALTER, J.

I shall consider the tenants in this case as holding estates for the life of Mrs. Smith, as well because it is so limited by the will, as because that limitation is, perhaps, not done away, or enlarged to a fee, by a charge in gross upon the land, which the tenants might be compelled to pay, at all events, whether they received profits or not, to the amount: 4 Bac. Abr., title Legacies and Devises, letter C; 6 Co. Rep. 61; 1 Eq. Cases Abr. 177.

But taking it at present that they are only bound to pay the legacies out of the profits, if so much are received—leaving it as a question hereafter to be decided whether, in default of profits sufficient, they are or are not to be paid, should such question ever arise—I shall proceed to inquire whether the tenants are to be laid under the restraint as to the use of the water and fuel prayed for, or any other restraint whatever.

First, as to the use of the water, and digging the new well.

If this was a lease for life of the use of the salt well, I can see no reason why digging a new one within a small distance of the old, so as to communicate with the same fountain,

should be restrained any more than opening new shafts to pursue the same vein of coal: 2 P. Wms. 388, *Clavering* v. *Clavering.* And the more especially as by such new shafts the whole vein may be exhausted, which it is not pretended could happen as to this fountain of water. I think, therefore, that the new well may lawfully be dug and used, in the manner, and for the purpose stated in the bill and answer; and that as any quantity of water might lawfully have been drawn from the old well, so it may from the new, even if the fountain itself should be dried up thereby, but which is believed to be impossible.

Second, as to the use of fuel.

There seems to be no doubt that the devise of the salt works is not to be restricted to the well alone, but that it extends also to the use of that mountain woodland which seems to have been acquired for the purpose of supplying fuel, without which the salt water would be of little use. The bill itself seems to admit that a use of fuel to the utmost extent that the testator used it, would be properly taken according to the intention of the will, and would not be waste. But the extent of the woodlands, their capacity of reproducing timber of equal value for fuel with that now upon them, and whether the wood cutting proceeds more or less rapidly than such reproduction, is not stated; nor does it appear that fuel can otherwise be procured. If a restraint is to take place, the use by the testator might be an improper standard, as he may have used it imprudently, or not to the extent that prudence would admit, or to which he would have used it on the increase of his funds, or as the demand for the article or the competition in market which has since taken place, would require, in order to continue the profits as great. It is therefore possible that a more full development of facts might change my opinion, these cases depending very much upon the circumstances attending each case; and consequently, any opinion now given by me, perhaps, ought not to conclude the parties, should a different case hereafter be made out; and will certainly not be intended to authorize malicious or extravagant waste, and which a tenant without impeachment of waste would be restrained from committing.

Considering this, then, as a devise as well of the use of the water as of the woodland for fuel, and that the use of the former is unlimited, is the use of the latter unlimited also?

Let us consider it, in the first place, by analogy to house-bote, fence-bote, etc. The house, or the field, which is the principal, may be used during the term to any extent not amounting to waste and may be kept in constant repair, although it may require all the timber or fence-bote on the land for that purpose, and so of fire-bote. The party having the right to these botes, and using them in the regular way, can not be restrained from taking the whole if such use requires the whole. So, here, the well is as the field to be cultivated and requires a use of wood commensurate with the use of water, and if prudently used to that extent any other restraint would seem contrary to the principle above declared in the cases of botes.

But again, in the case in Hobart, 234, which was an action of waste for felling oaks, etc., the defendant pleaded that he had a lease to him of all mines, etc., and that he felled the oaks to make certain utensils about the mines, without which they could not be used. It appeared that the landlord had been in the habit of taking the same kind of timber for the same purpose, and also the tenant, on some previous occasions. The maxim, "that the grant of a thing carried all things included, without which the thing granted could not be had," was held not to avail the defendant in this case; for that grant is to be considered of things incident and directly necessary. But suppose the use of timber for these purposes had in that case been incident and directly necessary to the use of the main thing granted, or had been granted also with it (one or the other of which seems to be the case here), could the party have been restrained, if, in using the mine to the extent he had a right to use it, it became necessary to use the whole of the timber for these purposes?

This case, too, supports my position that the use by the testator is not a proper criterion in favor of a tenant, as the owner of the fee may waste or use his timber as he pleases; and if it is no criterion in his favor, it ought not to be against him.

But this case may perhaps be placed on yet higher ground in favor of the tenants, who, if I am not mistaken, may be considered as without impeachment of waste, or having an unlimited right to use the fuel in order to effect the objects

of the testator. I presume express words to that effect are not necessary in a will, but, in this respect as in all others, the intention shall prevail. In 1 Bro. Ch. Cases, 166, a testator devised land to his wife for life, and by a codicil he says: "Whereas, by my will, my wife can not cut any timber; now my will and mind is that she may, whilst she continues my widow, cut timber for her own use and benefit at seasonable times in the year." Under this power she began to cut and sell. It was contended that she had not a right to cut timber for sale, but only for her own use on the estate and for estovers. The lord chancellor utterly rejected this idea that she was only entitled to cut for her own use on the estate, etc., and said she was entitled to cut everything that could be called timber; in other words, she was tenant without impeachment of waste. And in 1 Eq. Cas. Abr. 221, it is said: "If there be a jointress with a covenant that it shall be worth such a yearly value, though her estate be not without impeachment of waste, yet she may do waste to make up the defect in value, and equity will not prohibit."

The parties here do not take by contract wherein each party would seek to make the best bargain, but, being the one the wife, and the other near relations, either of the testator or his wife, were themselves objects of his affection and bounty; and by means of this devise too, other near relations and objects of very extensive bounty, are intended to participate in his munificence. He had no children in whom to vest this large estate, and having numerous collaterals, he seeks to make a provision for them, by inducing the devisees of his capital, whether vested in the salt works or in merchandise, to take the management thereof, and devote their time and labor, not only for their own benefit, as objects nearest his affection, but to raise extensive legacies for his other relations; providing, in case he should have a child, this arrangement should not take place. For what purpose should he limit the use of this property in favor of one collateral relation, when such limitation might prevent, within the life of his wife, the making a sufficient clear property to pay the legacies to others, and might also prevent the wife and the other devisees of the life estate, from that gain which they had a chance to make, during the said estate, and which was as well the desire of the testator in their favor, as

the great inducement on which they would be expected to undertake so important and hazardous a business? Suppose the legacies had failed in consequence of these devisees not pushing the business as far as the funds placed in their hands would justify; could they be considered as fulfilling the object and desire of the testator, or acting justly by the legatees?

For these reasons, my strong impression at present is, that the testator intended a free and unlimited use of his capital, whether consisting of moneys, salt mineral or woodland, especially as the quantity of the latter may have been so great as that he may have supposed the capital given, and its probable increase, could not, during one life, produce a lasting bad effect to the remainderman, and was therefore willing to risk this in favor of persons equally dear to him, and as a boon to them for undertaking the task.

It is not contended (nor do I intend to say such allegation would alter my opinion) that any new capital has been, or is likely to be introduced, or that the money part of it turned out to be greater than was expected by him. On the contrary, it is stated that the reverse is the fact as to the mercantile transactions, which have been absorbed by the payment of debts, so that a large portion of the bounty which these parties were expected to take (and, consequently, their means of carrying on the work still more extensively,) has failed.

Upon the whole, I am for affirming the decree.

JUDGE CABELL.—The law of waste in England varies and accommodates itself to the varying wants and situation of the different counties in that country. Thus, what is waste in one county, is not waste in another. On the same principle the law of waste, in its application here, varies and accommodates itself to the situation of our new and unsettled country.

The questions in this case, as to the rights of the appellees under the will of William King, relate to the use of certain water impregnated with salt, and to the use of the wood, on the lands of the said King, necessary for converting that water into salt.

The clause in William King's will, on which this controversy depends, is in the following words: "During the lifetime of my wife, it is my intention and request that William Trigg, James King and her do carry on my business in copartnership, both

salt works and merchandising, each equal shares; and that in consideration of the use of my capital they pay out of the same the following legacies."

The legacies are then specified, amounting, as appears from the answers, to about $70,000. I refer to the answers, because the amount can not be ascertained from the will itself, as many of the legacies are given to persons described, not by name, but as the children of certain parents, without mentioning the number of children. As the answers, however, are not replied to, the facts which they state in relation to the controversy, whether responsive to the bill or not, must be taken to be true.

First, as to the water.

The answers, entitled to respect as aforesaid, show that the new well which the appellees are sinking is not for the purpose of reaching any new vein of water, but as the only practicable mode of using the old vein. The case of *Clavering* v. *Clavering*, 2 P. Wms. 388, is conclusive to show that tenant for life of coal mines, even when not without impeachment of waste, may open new pits or shafts for working the old vein of coal. The reason on which that case was decided applies forcibly to this, viz., that otherwise the works could not be carried on. The objection to the new well being thus removed, the question is only as to the extent to which the appellees may use the water of the old vein; and on this point it is contended by the appellants that no greater quantities ought to be used than were used by King himself about the time of his death. In England a tenant for life or years of land in which there were mines of coal, or the like, opened at the time of the lease, may work them and take the profits, even although the lease does not mention the mines, (Co. Lit. 54, B) and I have been unable to find that the tenant in such case was ever restricted in the use of the mine, even although such use should entirely exhaust it before the determination of his estate. But the facts stated in the answer in this case, lead to the belief that the saline mineral is inexhaustible. These facts were well known to William King, the testator. When, therefore, he expressly granted by his will, to the appellees, the use of this water, he could have had no possible motive to restrict them in its enjoyment; and in the absence

of all express restrictions, it will be difficult in such a case to raise them by implication. There are, on the contrary, the strongest circumstances in the will itself, to show that he intended no restrictions whatever. The tenants for life were his wife, his brother and the husband of his niece. He intended to give them a beneficial interest. When, therefore, he limited its duration to the life of Mrs. King, which might terminate shortly after his own, and charged it with the payment of $70,000, a considerable part of which was payable in a few years after his death, it can hardly be supposed that he intended to restrict them in the use of salt water (perhaps the principal source from which the legacies were to be raised), especially when he considered that water to be inexhaustible. Thus to restrict them might be to defeat, entirely, the bounty intended for them.

I do not contend that the tenants for life became bound, by accepting the devise in their favor, to pay, at all events, the several sums directed to be paid as the consideration of that devise. I believe they were bound to pay out of the *profits* only, and that the determination of their estate, before the profits could pay the debts, would discharge them from the payment of the residue. But they would be bound to the extent of the net profits. Suppose, then, Mrs. King should die precisely at the time that the profits should amount to $70,000, it is clear that the tenants for life would not receive one cent for themselves. A construction leading to such a result ought not, I think, to be favored; and even as to the legatees of the $70,000, who were his near relations, a restricted use of the water might have protracted their payment to a most unreasonable length of time. If it be said that these legacies are so charged on the capital, that they would not be lost by the death of the tenants for life, but that the reversioner or remainderman would be liable for them, this would only show that he has the less reason to object to such use of the capital by the tenants for life, as would enable them to discharge the legacies.

On these grounds I do not think the testator intended any restriction in the use of the water.

Secondly, the remaining question is as to the wood necessary for converting the water into salt.

The will requests the tenants for life to carry on his "business, in copartnership, both salt works and merchandising." Fuel was an essential article for carrying on the salt works, and the wood on the testator's lands had been generally used for that purpose. The bill itself states that the lands are of little value for cultivation, being generally too steep for that purpose, but are very valuable as affording fuel for the works. It expressly admits the right of the tenant for life to use as much of the wood as William King himself used at the time of his death. And even without that admission, I presume no one would hesitate in pronouncing that the will gives the right to use *some* wood in carrying on the salt works; for they are to be carried on with the capital of the testator, consisting, in part, of the water and the wood. The only question is, whether the testator intended any restriction, as to quantity, so far as the wood is used, in prosecuting the salt works. And I will here observe that the arguments urged to show a right to an unlimited use of the water, apply with equal force to a like use of the wood. They need not, therefore, be repeated. And if, as I have endeavored to prove, the testator intended an unlimited use of the water, can we suppose that, in granting the use of wood for that purpose, he intended to limit that use? I humbly conceive that every principle of just construction would forbid such a conclusion. I conceive the use co-extensive with the object, which, in this case, is unlimited. This opinion is strongly fortified by the law on analogous subjects. In the cases of house-bote, hay-bote, plough-bote, etc., the tenant is unrestricted so long as he does not exceed what may be necessary for the purpose: 7 Bac. Ab. 254, and the cases there cited. So, likewise, a tenant who is generally restrained by the nature of his estate from cutting down timber, may nevertheless cut down timber for the purpose of repairing houses. Nor is there any case in the books which I have seen, showing that he may not use as much as may be necessary for such lawful purpose, even although he should cut down the only timber tree on the land. Where there is a right to use a thing at all, the right goes to all the extent which a lawful object may require. In the case before us, the object of converting the water into salt is a lawful one under this will, and is unlimited in the extent to

which it may be carried. The use of the means by which the testator intended it should be accomplished, is, therefore, equally unlimited. We have before seen that a tenant for life of a mine of coal may use it till he exhaust it, even although the interest of the reversioner or remainderman may be thereby entirely destroyed. If this be the case, when the thing itself is consumed by the use, never to be reproduced, *a fortiori*, the right exists in the case of wood, which will reproduce itself in a series of years.

The case of *Lord Darcy* v. *Ashwith*, Hob. p. 234, has not, as I conceive, any application. That was a case depending on a lease, and the point decided was that the lease did not give the right to use any timber for making utensils for working the mines. The present case is one depending on a will, in which, it is admitted by all, an intention is manifest to give the right to use some wood for carrying on the contemplated business. The question in Hobart was, whether there was any right, and it was decided the lease gave none. Here the right is admitted to be given by the will, and the only question is as to the extent of that right, which, for the reasons above mentioned, I consider to be unlimited.

This is a case depending on a will; and in such a case the intention governs. The tenants for life were the nearest and dearest objects of the testator's affections and bounty. I can not impute to him the intention contended for by the appellants; for it might, in consequence of the increased expense of making salt, and the diminished price of the article stated in the answers, protract the payment of the legacies charged upon the life estate till that estate might reasonably be expected to expire, and, in that event, convert these near and dear objects of his affections literally into hewers of wood and drawers of water, for the sole benefit of others less dear to the testator.

Nor am I for sacrificing the rights of the reversioner or remainderman. He may prevent any malicious waste, by application to a court of equity. His rights are farther protected by one other circumstance; that the use of the wood and water will always be regulated by the demand for salt, and in the absence of all positive restrictions by the testator, it is fair to presume that he considered the restriction which

would necessarily result from the limited demand for salt, as being abundantly sufficient.

I am for affirming the decree of the chancellor.

Judge BROOKE was of the same opinion. Judge ROANE filed a dissenting opinion as to the right of the life tenant to cut timber without stint.

1. Patent for salines after reservation by the United States, held void: *Morton* v. *Nebraska*, 12 M. R. 461; *Edwards* v. *Darby*, 12 Wheat. 206.

2. Defense to specific performance on the ground of salt spring known to vendee with concealment of such knowledge from vendor: *Bowman* v. *Irons*, 13 M. R. 312; laches in such case: *Id.*

3. A "salt lick" and a "salt spring" as used in acts of Congress mean the same thing. Salines not reserved go to the patentee: *State* v. *Miller*, 3 McL. 151.

4. Construction of the statute of the Republic of Texas, reserving salt springs: *Cowan* v. *Hardeman*, 13 M. R. 113.

5. Lease of salines construed: *Clark* v. *Babcock*, 8 M. R. 599. Contract between salt producer and salt dealer construed: *Brewer* v. *Salt Association*, 47 Mich. 526.

6. Attempt to rescind sale of salt well on ground of misrepresentations as to strength of the brine: *Whiting* v. *Hill*, 6 M. R. 692.

7. Salines are not patentable as placers under the U. S. Mining Acts: 13 Land Owner, 53.

8. Salt is a mineral: *State* v. *Parker*, 61 Tex. 265.

[1]HIGGINS V. HOUGHTON, SURVEYOR-GENERAL OF THE STATE OF CALIFORNIA.

(25 California, 252. Supreme Court, 1864.)

[2]**Mineral lands included in grant for school purposes.** The act of Congress of March 3, 1853, which granted to the State of California the sixteenth and thirty-sixth sections of public lands for school purposes, was designed to and did include mineral lands.

At what time title vests in the State. Under the act of March 3, 1853, the State of California became the absolute owner of sections sixteen and thirty-six, both as to quantity and position, as fast as they were surveyed and sectionized, and her title did not depend upon the acceptance of selections by the officers of the United States.

Power of State to sell mineral lands. The State of California, as owner of sections sixteen and thirty-six, may sell and issue patents for them regardless of the fact that they contain precious metals, or may by her laws prohibit the sale of such lands.

Certificates of purchase of school lands. Persons who hold certificates of purchase from the State for the sixteenth or thirty-sixth sections, or portions thereof, hold the land as the State held it before the certificate was issued, subject to the right of miners to enter upon and work it for mining purposes.

Patents for school lands. Query: Does the patentee of the State, or any part of the sixteenth or thirty-sixth sections, hold the same subject to the right of miners to enter upon and work the same for mining purposes?

Appeal from the District Court, Sixth Judicial District, Sacramento County.

The facts are stated in the opinion of the court.

ATTORNEY-GENERAL, for appellant.

Upon both these points—that this being mineral land the State can not sell, and that having no approval of the selection by the secretary of the interior, the State can not give any title—the court is referred to Lester's Land Laws, p. 643;

[1] Cited *People* v. *Crockett*, 33 Cal. 154; *Sherman* v. *Buick*, 45 Cal. 667; 93 U. S. 210.

[2] Overruled on this point: *Ivanhoe Co.* v. *Keystone Cons. Co.*, 102 U. S. 167, 13 M. R. 214.

Summers v. *Dickinson*, 9 Cal. 554; *Doll* v. *Meador*, 16 Cal. 296; *Kyle* v. *Tubbs*, 23 Cal. 431.

A. S. HIGGINS, for respondent.

By the Court, SHAFTER, J.

The complaint alleges, substantially, that the United States, by virtue of an act of Congress approved March 3, 1853, granted to the State of California the sixteenth and thirty-sixth sections in every township for the benefit of public schools therein; and that all and singular the conditions precedent required by the act of the legislature of this State, passed April 27, 1863, and entitled "An act to provide for the sale of certain lands belonging to this State," having been fulfilled by the action of the proper State officer, and by a performance on the part of the plaintiff of all the requirements of said act to be complied with by him, he, the said plaintiff, has become and now is entitled to a patent from the State of California of the north half of section sixteen, in township number thirteen north, range seven east, Mount Diablo base and meridian, containing three hundred and twenty acres of land; and that it has become and is the duty of the defendant, as register *ex officio* of the State Land Office, to prepare the patent aforesaid and to certify the same to the governor for his signature; which duty the defendant neglects and refuses to perform, though specially requested so to do on the 24th of December, 1863. The complaint concludes with a prayer for a mandamus.

The answer of the defendant denies that the lands in question were ever granted to the State by the United States, and the reason assigned is that they are mineral lands; and it is further alleged as a reason why the patent should not issue, that "the plaintiff has not procured the approval of the secretary of the interior or the proper officer of the United States Government of his said location and selection."

It is further stated in the answer, that a written protest has been filed in the office of the defendant, signed by many persons, claiming said lands as mineral lands; and the answer further alleges that they are mineral lands in fact.

The court below found that all the allegations of the complaint were true; that the answer stated no defense as a matter of law, and adjudged that the alternative mandamus first issued be made peremptory.

1. We shall in the first place consider whether the title to the lands in question, assuming them to be mineral lands, passed to the State by virtue of the grant contained in the act of Congress of March 3, 1853.

The grant occurs in the sixth section of the act referred to, and is as follows: "That all public lands in the State of California, whether surveyed or unsurveyed, with the exception of sections sixteen and thirty-six, which shall be and hereby are granted to the State for the purposes of schools in each township, and with the exception of lands appropriated under the authority of this act or reserved by competent authority, and excepting also the lands claimed under any foreign grant or title, and the mineral lands, shall be subject to the pre-emption laws of the 4th of September, 1841."

The language of the grant is too exact and luminous to require or admit of any resort to construction. There is no statement of any condition, exception, reservation, or limitation; and in our judgment the grant vested in the State a quantity of land equal to one thousand two hundred and eighty acres, multiplied by the number of townships into which the public lands in California were capable of being divided, the moment the act received the signature of the president. Mineral lands are excepted from the operation of the pre-emption laws, but they are not withdrawn by the act from the operation of the grant.

Further, there is no reason to believe that the failure of the government to reserve the mineral lands was the result of inadvertence, for in the grant of seventy-two sections for the use of a seminary of learning, and in the grant of ten sections for the purpose of erecting public buildings, both of which grants are contained in the act of March 3, 1853, the mineral lands are exempted from the operation of the grants respectively by express proviso.

But the question now under discussion can not be regarded as an open one. In the case of *Doll* v. *Meador*, 16 Cal. 296, it was held that California, upon her admission into the Union,

acquired, under the eighth section of the act of Congress of September 4, 1841, entitled "An act to appropriate the proceeds of the sales of public lands," a vested and present interest in five hundred thousand acres of land, to be selected out of any public lands of the United States within her limits, except such as were expressly excepted in the grant. This decision was affirmed in *Van Valkenburg* v. *McCloud*, 21 Cal. 330, and is, furthermore, well sustained by the decision in *Foley* v. *Harrison*, 15 How. 447.

It appears from the pleadings in the case at bar that township number thirteen was surveyed and sectionized by the surveyor-general of the United States prior to the 20th day of March, 1861, and, as we understand, subsequent to the grant.

2. As to the objection that the respondent has not procured the acceptance of his selection by the proper officers of the United States Government.

The appellant, assuming that there has been no such acceptance in fact, draws from it this conclusion: "And therefore the State can not grant a title until she procures certified lists of the approval of selections (including respondent's) by the secretary of the interior."

The reasoning goes altogether upon the hypothesis that the State's title to sections sixteen and thirty-six in township number thirteen, is inchoate, and that it would therefore be improper to issue a patent.

Whether the title of the State is perfect or imperfect, depends upon the legal effect of the grant contained in the act of Congress of March 3, 1853, coupled with the subsequent survey and sectionizing of township number thirteen.

Admitting that the title of the State was inchoate, in a certain sense, at the date of the grant—that is to say, that it did not determine, with then present precision, the exact localities upon which it was to attach finally (*Lessieur* v. *Price*, 12 How. 77)—still, that is certain which may be rendered certain.

We consider that in the grant to California of March 3, 1853, the power of locating the quantity granted—one thousand two hundred and eighty acres in effect, in two parcels in every township—was reserved to the government, and as fast as townships thereafter were surveyed and sectionized, that the

State became the owner of the sixteenth and thirty-sixth sections absolutely, not only as to quantity, but as to position also.

Township number thirteen was surveyed and properly subdivided subsequent to the grant and prior to May 20, 1861; and since the date of that occurrence the State, by the effect of the grant and by the law of the event, has been and is now the absolute and several owner of the sixteenth and thirty-sixth sections of that township, as against the government. If there is any legislation by Congress prior to the grant, which would interfere with the conclusion, as the objection in effect supposes, it has not been brought to our notice; and if there has been any legislation since the grant that conflicts with the conclusion, it must be null and void unless, indeed, it has been acceded to by the grantee. But we are not advised by the brief filed for the appellant that any such hostile legislation has been attempted.

3. But it does not follow necessarily that the State, because it is the owner of the sixteenth section in question, is bound to patent the north half of it to the respondent, or to anybody else.

The State, as owner of the sixteenth and thirty-sixth sections of every township within its limits, in the clear exercise of the *jus disponendi*, first entered the market in search of purchasers in 1858; and in a series of acts found in the session laws of that year, the State dictated or prescribed the terms upon which it would patent those sections, in whole or in part, as well as other public lands to individuals. In 1859–'60–'61, there was further legislation upon the general subject; and in 1863 the whole of the previous legislation was revised, and to a great extent supplanted by an act found in the published statutes of that year at page five hundred and ninety-one.

By one of the provisions of this act any citizen who shall have complied with all the terms and conditions set forth therein in relation to the particular land which he wishes to purchase, shall be entitled to a patent therefor.

As previously stated, it is alleged in the complaint that all the requirements of the act, as connected with his claim to the north half of section sixteen of township number thirteen,

have been complied with by the respondent and the concurrent action of the proper public functionaries. The answer denies the averment in one particular only. The denial is as follows: "Defendant avers that plaintiff has not at any time procured the approval of the secretary of the interior or of the proper officer of the United States Government to plaintiff's location or selection."

We have already passed upon the question whether the title of the State to the sixteenth and thirty-sixth sections was by the terms of the grant of March 3, 1853, made to depend in any manner upon the action or non-action of the secretary of the interior, and the question now presented is, first, whether by the act of the legislature of California, passed in 1863, the approval of the secretary of the interior of the plaintiff's selection of the north half of section sixteen, township number thirteen, is made a condition precedent to the plaintiff's right to a patent therefor from the State.

On this point it is sufficient to say, that in the brief of counsel no reference is made to any such provision in the act of 1863, or in any of the acts that preceded it. We have diligently examined the whole series of acts for ourselves, and can find no traces of any such provision.

But the averment in the answer is in the alternative: "Nor has the plaintiff procured the approval of the proper officer of the government to said selection or location."

The act of 1863 (page 594, section 8) is as follows: "Whenever the amount of three hundred and twenty or more acres has been applied for under any one grant, he (the State locating agent) shall, in behalf of the State, make application to the register of the United States Land Office for the district, for such lands, in part satisfaction of the grant under which they are located, and obtain his acceptance of the selections, which acceptance, together with the corresponding certificates of location according to the form prescribed by the surveyor-general, he shall forward with the proper affidavits to the office of the surveyor-general for approval, and when approved and returned to him, he shall record the approval and forward the approved certificate of location to the applicant."

Assuming that the approval of the United States register.

spoken of in this section, is a condition upon which the right to a patent is made to depend, still the issue taken by the answer upon the question of fact, was determined against the appellant by the court. There is no statement of the evidence, nor was there any motion made for new trial. The appeal is from the judgment alone.

There is a stipulation in the case that the parties mutually waive "all observance of form and regularity in time, pleadings, and orders;" still we are limited by the stipulation to "the questions of law presented by the case," and *they* are limited to questions of error arising upon the judgment roll.

4. As to the protest filed in the office of the appellant.

The protest states that the parties to it are citizens "dwelling" on the north half of section sixteen, township number thirteen; that a large number of copper and gold and silver ledges were discovered and located in February, 1863, on the same, and a mining district formed embracing said tract of land, and that over fifty thousand dollars worth of work has been done on said ledges; and if said tract of land should be patented to Higgins, property of the value of more than one hundred thousand dollars will be taken from the present owners.

It is not stated that the signers of the protest have any interest in the land, ledges, or mining improvements, or that they or any of them will be subjected to any loss should the patent issue. On the face of the protest, the parties to it have no relations to the land except as "dwellers" upon it at the point of time when the protest was signed—December 10, 1863. Nor does it appear from the protest or otherwise that down to the date of the respondent's certificate of purchase—November 16, 1863—there were any improvements upon the land not put there by him, nor that any one had, anterior to that date, any valid claim, or even preferred an invalid one, to the land as such. Still, we consider the protesters as competent parties, under the act of 1863, to contest the plaintiff's right to a patent: *Tyler* v. *Houghton*, 25 Cal. 26.

Assuming then, that all the averments and recitals set forth in the protest are true, the question is presented, whether, on the ground of any or all of them, or on the ground of any

other fact which the case discloses, the plaintiff is barred of a patent.

If barred, it can not be on the ground that a pre-emption right to the land is or may be outstanding in some one claiming under the laws of the United States; for by the grant of the sixteenth and thirty-sixth sections to the State in full property, they were effectually withdrawn from the operation of the acts relating to pre-emptions; and further, if they had never been so granted, no one, by virtue of those acts, could have ever acquired any title to or interest in them if they are mineral lands, as both the protest and answer allege them to be.

Neither can it be said that the plaintiff's right fails on the ground of *any* claim to the land, as such, superior to his own, for the case shows no such claim, either real or pretended.

It results, then, that if a patent is not due to the plaintiff, it must be on the ground that the mining claims taken up in February, 1863, on the lines of the ledges named in the protest, would pass to the plaintiff by force of the patent, and that, the ledges having been thus reduced to private ownership, mining claims could not thereafter be located upon them under the rules and regulations of miners.

If this were all true, still the State has both the right and the power to do as it chooses with its own. If the State owns mineral lands, its right to sell and convey them can not be disputed. By so doing, it might prejudice its own interests, and even violate its faith pledged to those who may have taken up and worked mining claims on mineral lands belonging to it, by its implied license; but as a question of power, the matter admits of but one solution.

The apprehension, however, that a patent to the plaintiff of the north half of the section in question would interfere with the mining claims and improvements now upon it, or that it would prevent the taking up and working of like claims hereafter, may be wholly groundless—a point, however, which we do not intend to decide.

The act of 1863, section seventeen, is as follows: "Where a certificate of purchase has been issued by the register, the same shall be deemed *prima facie* evidence of legal title to the land for which the certificate of purchase issued; *provided*

such certificates of purchase shall not be so construed as to affect the working of mineral lands for mining purposes."

Three things at least are demonstrated by this provision: First, that the State by the act of 1863, assumed that it was the owner of mineral lands, and that as such owner it had the right to sell and convey them; second, that it was the purpose of the act to put these lands upon the market for sale upon the terms and under the methods prescribed in the act for the sale of the public lands at large; third, that it was, however, the intention of the act that the parties by whom such mineral lands should be purchased, and to whom they should be certified, should hold them under the certificate as the State held them before the certificate was issued—subject to be entered upon and worked for mining purposes.

Should a patent then be issued to the plaintiff of the north half of section sixteen, he might, perhaps, hold the patent, notwithstanding the absoluteness of its terms, subject to the rule of construction provided for in the act under which he purchased, and under which his title paper issued. True, by the mere words of the statute, the rule of construction referred to is applied to the certificate of purchase alone; but the point may at least be made, that the legislature intended that the patent, as a title paper, should be affected by the rule of construction to which the document that precedes it in the order of events, is expressly subjected. If it should be held that the main purpose of section seventeen was to conserve the policy of the State in the matter of mines and mining as settled at the beginning of its political history, then section seventeen should undoubtedly be so construed that that result may be secured.

We have, in this opinion, passed upon all the questions raised and discussed by counsel—though to a disposition of the case a decision of one point only was essential—and we have done so for the reason that a decision of all the points made in argument is a matter of public interest, and, as we gather from the brief filed for the surveyor-general, is also a matter of urgent concern in his office.

Judgment affirmed.

[1] HEYDENFELDT v. THE DANEY GOLD & SILVER MINING COMPANY.

(93 U. S. 634. Supreme Court, 1876.)

At the time of the passage of the Nevada enabling act (1864), sections 16 and 36 (school sections) had not been surveyed, nor had Congress then authorized any disposition of the public domain within her limits.

Title passes not till survey—Compensation. In the grant of school sections, under the Nevada enabling act it was not intended to pass title until the lands were surveyed. The settler on such lands before survey was to be protected, and any loss to the State was intended to be compensated by other lands.

Mining patent on school land. The holder of a patent from the United States for a mining claim, located upon a school section, holds title as against the patent of the State, prior in date to the United States patent, but later than the date of the mining location.

[2] **Patent relates back.** A patent of the United States to a mining claim (upon a school section) relates back to the time of the original location, to the exclusion of all adverse intervening rights.

Error to the Supreme Court of the State of Nevada.

This is an action of ejectment brought by Heydenfeldt in the District Court of the First Judicial District of Nevada, against the Daney Gold and Silver Mining Company. The case was tried by the court, which found the following facts:

On the fourteenth day of July, 1868, the State of Nevada issued to one William Webelhuth its patent for the west half of the southwest quarter of section 16, township 16 north, range 21 east (lying in Lyon county, State of Nevada), Mount Diablo base and meridian, containing eighty acres, according to the official plat of the survey of public lands as made by the United States surveyor-general for the district of Nevada; which said patent was recorded in the recorder's office of the county of Lyon on the twenty-fifth day of July, 1868, and was issued by the State authorities, under and by virtue of the statute of Nevada, conveying lands assumed to have been granted to the State by the act of Congress approved March

[1] S. C. below, 10 Nevada, 390.

[2] *Silver Bow Co.* v. *Clark*, 5 Mont. 378.

21, 1864, entitled "An act to enable the people of the Territory of Nevada to form a State government upon certain conditions."

On the eighteenth day of August, 1873, William Webelhuth, by deed of conveyance duly signed, sealed and acknowledged, conveyed the same premises to one Philip Kitz, which deed was recorded in the recorder's office of the county of Lyon, January 13, 1874.

On the ninth day of January, 1874, Philip Kitz, by deed duly signed, sealed and acknowledged, conveyed the same premises to this plaintiff, which said deed was duly recorded in the recorder's office of the county of Lyon on the same day.

The defendant is in the possession of the premises. The plaintiff, prior to bringing this action, demanded the possession thereof, but the same was refused.

On the second day of March, 1874, the United States, by its proper authorities, granted to the defendant by its patent, in due and regular form, lot No. 72, embracing a portion of section 16, in township 16 north, of range 21 east, Mount Diablo meridian, in the Devil's Gate mining district, in the county of Lyon and State of Nevada, in the district of lands subject to sale at Carson City, embracing thirteen acres and seventy-eight one-hundredths of an acre, more or less, with the exclusive right of possession and enjoyment of all the land included within the exterior lines of the survey of said premises not expressly excepted, and of two thousand linear feet of Mammoth Lode ledge, vein or deposit for said two thousand feet therein throughout its entire depth, etc., which said grant by the patent covers and includes the lands and premises sought to be recovered by the plaintiff from the defendant in this action, and which said patent was so issued to the defendant under and by virtue of the act of Congress approved July 26, 1866, entitled "An act granting the right of way to ditch and canal owners over the public land and for other purposes;" the act amendatory thereof, approved July 9, 1870, and the act approved May 10, 1872, entitled "An act to promote the development of the mining resources of the United States."

The land in controversy is mineral land containing precious

metals, and the defendant is in possession and is conducting and carrying on the business of mining thereon, having in the prosecution of mining erected and constructed improvements of the value of over $80,000.

In 1867, and prior to the date of the survey or approval of the survey of section 16, township 16 north, range 21 east, by the United States, the defendant's grantors and predecessors in interest had entered upon the premises described by plaintiff in his complaint for mining purposes, and had claimed and occupied the same in conformity to the laws, customs and usages of miners in the locality and mining district in which said premises are situated, and were so possessed and engaged in mining thereon when the said land was first surveyed, and when the State of Nevada issued its patent as aforesaid to William Webelhuth.

Thereupon, as conclusions of law, the court found:

The act of Congress approved March 21, 1864, enabling the people of the Territory of Nevada to form a constitution, etc., under and by virtue of which act the State of Nevada selected the land, and sold and conveyed the same to the predecessors in interest of the plaintiff, did not constitute a grant *in præsenti*, but an inchoate, incomplete grant until the premises were surveyed by the United States, and the survey properly approved.

Said survey and approval thereof not having been made prior to the entry thereon and claim thereto by defendant's predecessors in interest for mining purposes, the same was not by said act of Congress, or in any other manner, ever granted by the United States to the State of Nevada.

The entry of defendant's grantors thereon for mining purposes, and their rights thereto, having become established prior to the survey of said section by the United States, the said premises were not included within, and did not pass to the State of Nevada, by the granting clause contained in said act of Congress of March 21, 1864, but, on the contrary, were excluded therefrom by reason of their having been previously possessed and occupied by defendant's grantors for mining purposes, in conformity with the mining laws, rules, and customs of miners in the locality where the same was situated, and in conformity with the act of Congress approved July 26,

1866, granting the right of way to ditch and canal owners over the public lands, and for other purposes.

Thereupon judgment was rendered for the defendant. The Supreme Court of Nevada having affirmed it, the plaintiff sued out this writ of error.

Submitted on printed arguments by Mr. W. E. F. DEAL for the plaintiff in error, and by Mr. C. E. DE LONG for the defendant in error.

Mr. JUSTICE DAVIS delivered the opinion of the court.

The validity of the patent from the State under which the plaintiff claims title rests on the assumption that sections 16 and 36, whether surveyed or unsurveyed, and whether containing minerals or not, were granted to Nevada for the support of common schools by the seventh section of the enabling act, approved March 21, 1864, 13 Stat. 32, which is as follows: "That sections numbered 16 and 36 in every township, and where such sections have been sold or otherwise disposed of by any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be, shall be, and are hereby, granted to said State for the support of common schools."

This assumption is not admitted by the United States, who, in conformity with the act of Congress of July 26, 1866, 14 Id. 251, issued to the defendant a patent to the land in controversy, bearing date March 2, 1874. Which is the better title is the point for decision. As it has been the settled policy of the government to promote the development of the mining resources of the country, and as mining is the chief industry in Nevada, the question is of great interest to her people.

It is true that there are words of present grant in this law, but, in construing it, we are not to look at any single phrase in it, but to its whole scope, in order to arrive at the intention of the makers of it.

"It is better always," says Judge Sharswood, "to adhere to a plain common-sense interpretation of the words of a statute than to apply to them refined and technical rules of grammatical construction:" *Gyger's Estate*, 65 Penn. St. 312. If a literal interpretation of any part of it would operate unjustly,

or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected. There is no better way of discovering its true meaning, when expressions in it are rendered ambiguous by their connection with other clauses, than by considering the necessity for it, and the causes which induced its enactment. With these rules as our guide, it is not difficult, we think, to give a true construction to the law under consideration.

Congress at the time, was desirous that the people of the Territory of Nevada should form a State government, and come into the Union. The terms of admission were proposed, and as was customary in previous enabling acts, the particular sections of the public lands to be donated to the new State for the use of common schools were specified. These sections had not been surveyed, nor had Congress then made, or authorized to be made, any disposition of the national domain within that Territory.

But this condition of things did not deter Congress from making the necessary provision to place, in this respect, Nevada on an equal footing with States then recently admitted. Her people were not interested in getting the identical sections 16 and 36 in every township. Indeed, it could not be known until after a survey where they would fall, and a grant of quantity put her in as good a condition as the other States which had received the benefit of this bounty. A grant operating at once, and attaching prior to the surveys by the United States, would deprive Congress of the power of disposing of any part of the lands in Nevada until they were segregated from those granted. In the meantime further improvements would be arrested, and the persons who, prior to the surveys, had occupied and improved the country, would lose their possessions and labor in case it turned out that they had settled upon the specified sections. Congress was fully advised of the condition of Nevada, of the evils which such a measure would entail upon her, and of all antecedent legislation upon the subject of the public lands within her bounds. In the light of this information, and surrounded by these circumstances, Congress made the grant in question. It is ambiguous; for its different parts can not be reconciled, if the words used receive their usual meaning. *Schulenberg* v. *Har-*

riman, 21 Wall. 44, establishes the rule that "unless there are other clauses in a statute restraining the operation of words of present grant, these must be taken in their natural sense." We do not seek to depart from this sound rule; but, in this instance, words of qualification restrict the operation of those of present grant. Literally construed, they refer to past transactions; but evidently they were not employed in this sense, for no lands in Nevada had been sold or disposed of by any act of Congress. There was no occasion of making provision for substituted lands, if the grant took effect absolutely on the admission of the State into the Union, and the title to the lands then vested in the State. Congress can not be supposed to have intended a vain thing, and yet it is quite certain that the language of the qualification was intended to protect the State against a loss that might happen through the action of Congress in selling or disposing of the public domain. It could not, as we have seen, apply to past sales or dispositions, and to have any effect at all, must be held to apply to the future.

This interpretation, although seemingly contrary to the letter of the statute, is really within its reason and spirit. It accords with a wise public policy, gives to Nevada all she could reasonably ask, and acquits Congress of passing a law which, in its effects, would be unjust to the people of the Territory. Besides, no other construction is consistent with the statute as a whole, and answers the evident intention of its makers to grant to the State *in præsenti* a quantity of lands equal in amount to the 16th and 36th sections in each township. Until the *status* of the lands was fixed by a survey, and they were capable of identification, Congress reserved absolute power over them; and if in exercising it the whole or any part of a 16th or 36th section had been disposed of, the State was to be compensated by other lands equal in quantity, and as near as may be in quality. By this means the State was fully indemnified, the settlers ran no risk of losing the labor of years, and Congress was left free to legislate touching the national domain in any way it saw fit, to promote the public interests.

It is argued that, conceding the soundness of this construction, the defense can not be sustained, because the land in controversy was not actually sold by direction of Congress until

after the survey. This position ignores a familiar rule in the construction of statutes, that they must be so construed as to admit all parts of them to stand, if possible. 1 Bouv. Inst., p. 42, Sec. 7. The language used is, "sold or otherwise disposed of by any act of Congress." The point made by the plaintiff would reject a part of these words, and defeat one of the main purposes in view. Congress knew, as did the whole country, that Nevada was possessed of great mineral wealth, and that lands containing it should be disposed of differently from those fit only for agriculture. No method for doing this had then been provided; but Congress said to the people of the Territory, "You shall, if you decide to come into the Union, have for the use of schools, sections numbered 16 and 36 in every township, if on survey no one else has any valid claim to them; but until this decision is made and the lands are surveyed, we reserve the right either to sell them or dispose of them in any other way that commends itself to our judgment. If they are sold or disposed of, you shall have other lands equivalent thereto."

The right so reserved is subject to no limitation, and the wisdom of not surrendering it is apparent. The whole country is interested in the development of our mineral resources, and to secure it adequate protection was required for those engaged in it. The act of Congress of July 26, 1866, *supra*, passed before the land in controversy was surveyed, furnishes this protection, by disposing of the mineral lands of the United States to actual occupants and claimants, and providing a method for the acquisition of title. The defendant, and those under whom it claims, occupied the land prior to the survey, and were entitled to purchase. The patent subsequently obtained from the United States relates back to the time of the original location and entry, and perfects their right to the exclusion of all adverse intervening claims.

These views dispose of this case; but there is another ground equally conclusive. Congress, on the 4th of July, 1866, 14 Stat. 85, by an act concerning lands granted to the State of Nevada, among other things, reserved from sale all mineral lands in the State, and authorized the lines of surveys to be changed from rectangular, so as to exclude them. This was doubtless intended as a construction of the grant under consid-

cration; but whether it be correct or not, and whatever may be the effect of the grant in its original shape, it was clearly competent for the grantee to accept it in its modified form, and agree to the construction put upon it by the grantor. The State, by its legislative act of Feb. 13, 1867, ratified that construction, and accepted the grant with the conditions annexed.

We agree with the Supreme Court of Nevada, that this acceptance "was a recognition by the legislature of the State of the validity of the claim made by the government of the United States to the mineral lands."

It is objected that the constitution of Nevada inhibited such legislation; but the Supreme Court of the State, in the case we are reviewing, held that it did not: 10 Nev. 314; and we think their reasoning on this subject is conclusive.

Judgment affirmed.

NATOMA WATER AND MINING CO. v. BUGBEY.

(96 United States, 165. Supreme Court, 1877.)

Where a prior settler upon a school section waives his right of pre-emption, the land vests, upon survey, in the State.

Idem—Rights of third parties. Where a settler upon school sections prior to their survey has waived his right of purchase from the United States and taken title from the State, a third party can not contest his title on the ground that the land was settled at the time of survey.

Ditch on school lands prior to act of 1866. The act of Congress granting the right of way to ditch owners can not affect land, the title to which had vested prior to its passage, although the ditch across such lands had been completed (according to the facts of the case) before the title to such lands had vested.

Error to the Supreme Court of the State of California.

The facts are stated in the opinion of the court.

SAMUEL SHELLABARGER and J. M. WILSON, for the plaintiff in error.

AARON A. SARGENT, *contra.*

WAITE, CH. J., delivered the opinion of the court.

This was an action of ejectment, brought by Bugbey, the defendant in error, against the Natoma Water and Mining Company, the plaintiff in error, to recover possession of a part of the south half of section 16, township 10 north, of range 8 east, Mount Diablo base and meridian, in the State of California. He claimed title by grant from the State, and the company under the act of Congress of March 3, 1853, "to provide for the survey of public lands in California, the granting of pre-emption rights therein, and for other purposes" (10 Stat. 244), and the act of July 29, 1866, "granting the right of way to ditch and canal owners over the public lands, and for other purposes" (14 Stat. 251).

The decision of the Supreme Court of California having been against the title set up by the company, this writ of error was brought. The facts affecting the Federal question in the case are as follows:

In 1851, the company commenced the construction of a canal upon the unoccupied and unsurveyed public lands of the United States, for the purpose of supplying water to miners and others. This canal was completed at large expense, in April, 1853, and the premises in controversy are included within its limits. By the act of March 3, 1853 (10 Stat. 244), Congress provided for the survey of the public lands of California, and granted sections 16 and 36 to the State for school purposes. By section 7 of this act, it was provided, "that where any settlement, by the erection of a dwelling-house, or the cultivation of any portion of the land, shall be made on the sixteenth and thirty-sixth sections, before the same shall be surveyed * * * other land shall be selected by the proper authorities of the State in lieu thereof, agreeably to the provisions of the act of Congress approved May 20, 1826 * * *" (4 Stat. 179).

The survey of the lands in controversy was completed May 19, 1866, and the plats deposited in the United States Land Office for the district, June 16, 1866. At that time Bugbey was an actual settler upon the legal subdivision of the section 16 in which the premises are situated, and had thereon a dwelling house, and agricultural and other improvements. He made no claim under the pre-emption laws of the United

States. Other persons were also in possession of other portions of the section. The act of 1853 required (Sec. 6) that, "where unsurveyed lands are claimed by pre-emption, the usual notice of such claim shall be filed within three months after the return of the plats of the surveys to the land offices." On the 28th of September, 1866, the register of the United States Land Office certified to the State Land Office, that no claim had been filed to this section 16, except the pre-emption of one Hancock, which was afterward abandoned.

Sec. 9, of the act of July 26, 1866, (14 Stat. 253,) is as follows:

"That whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid, is hereby acknowledged and confirmed. * *"

The company has brought itself within the provisions of this section, if at the time of the passage of the act the United States held title to the lands.

On the 22d of April, 1867, Bugbey purchased the portion of the section on which the premises in controversy are situated, from the State of California, and took a patent; the company does not in any manner connect itself with this title, or with that of any other occupant of the section previous to the survey.

In *Sherman* v. *Buick*, 93 U. S. 209, it was decided that the State of California took no title to sections 16 and 36 under the act of 1853, as against an actual settler before the survey, claiming the benefit of the pre-emption laws, who perfected his claim by a patent from the United States. In such a case the State must look for its indemnity to the provisions of Sec. 7 of the act. As against all the world, except the pre-emption settler, the title of the United States passed to the State upon the completion of the surveys, and if the settler failed to assert his claim, or to make it good, the rights of the State became absolute. The language of the court is (p. 214): "These things (settlement and improvement under the law) being found

to exist when the survey ascertained their location on a school section, the claim of the State to that particular piece of land was at an end; and it being shown in the proper mode to the proper officer of the United States, the right of the State to the land was gone, and in lieu of it she had acquired the right to select other land, agreeably to the act of 1826."

In that case, the controversy was between the settler, who had perfected his title from the United States, and a purchaser from the State. Here the company does not claim under the settler's title, but seeks by means of it to defeat that of the State, and thus leave the land in a condition to be operated upon by the act of July 26th. The settler, however, was under no obligation to assert his claim, and he having abandoned it, the title of the State became absolute as of May 19, 1866, when the surveys were completed. The case stands, therefore, as if at that date the United States had parted with all interest and control over the property. As the act of July 26th was not passed until after that time, it follows that it could not operate upon this land in favor of the company.

This disposes of the only Federal question in the record.

Judgment affirmed.

THE IVANHOE MINING CO. v. THE KEYSTONE CONSOLIDATED MINING CO.

(102 United States, 167. Supreme Court, 1880.)

Mineral lands excluded in grant of school lands. The act of March 3, 1853, which granted to the State of California the 16th and 36th sections of public land for school purposes, did not cover mineral lands, they being, by the settled policy of the general government, excluded from the grant.

Strict pre-emption settlement not required. By the provisions of section 7 of the act of March 3, 1853, whenever, at the date of the survey of sections 16 and 36, of the public lands granted by said act to the State of California for school purposes, a settlement had been made thereon by the erection of a dwelling house, or by cultivation, and a title asserted by virtue of such settlement to a portion thereof, such title is valid, although the acts done are not the same as required to secure a pre-emption right under the act of Sept. 4, 1841.

Idem—Right of selection in lieu. The title in such a case where the settler's right has intervened does not vest in the State, but she has the right to select other land in lieu thereof.

Error to the Circuit Court of the United States for the District of California.

The facts are stated in the opinion of the court.

Mr. PETER VAN CLIEF and Mr. OLIVER D. BARRETT, for the plaintiff in error; Mr. SAMUEL M. WILSON and Mr. GEORGE A. NOURSE, for the defendant in error; Mr. BENJAMIN F. BUTLER, for the State of California; and THE ATTORNEY-GENERAL for the United States.

Mr. JUSTICE MILLER, delivered the opinion of the court.

The action in this case was brought originally in the State Court of California by Daniel W. Gillette against the Keystone Consolidated Mining Company, the present defendant in error, to recover possession of the east half of section 36, in township 7 north, range 10, east of Mount Diablo meridian, and in the progress of the case it was transferred to the Circuit Court of the United States, where judgment was rendered in favor of the defendant. The Ivanhoe Mining Company, the plaintiff in error, having been substituted for Gillette, as his successor in interest, a jury was waived by the parties, and the case submitted to the court.

The plaintiff asserted title to the land in controversy under a patent from the State of California, and the defendant under patents from the United States. The title of California rests upon the act of Congress granting that State the sixteenth and thirty-sixth sections of every township for school purposes, and that of defendant on the acts of Congress concerning the possession and sale of the mineral lands.

As the question to be decided necessarily involves the title to much other mineral land in California, in which the authorities of the State of California and the officers of the Land Department of the United States entertain and act upon conflicting views of the rights of the State and the general government, the State of California, by her counsel, and the

United States by the Attorney-General, have been permitted to take part in the argument.

The defendant only claims part of the land embraced in the plaintiff's patent, and denies possession of that for which no title is asserted, and, as no possession is proved beyond that for which the defendant defends, only that is in controversy.

The court below finds that this is mineral land, and that the patent of the United States was issued to defendant for three several mining claims, to wit, the Spring Hill, the Geneva and the Keystone. That the Spring Hill was located in May, 1851, the Keystone in 1853, and the Geneva in October, 1863; and that the original locators of said claims and their grantees have held undisturbed possession thereof ever since, and by such possession and the working of said mines, the possessory title was vested in defendant at the time it filed its application for said patent in the land office of the United States at Sacramento, Jan. 6, 1871, unless the State of California had acquired title to section thirty-six by grant from the United States. It also appears that on the land thus claimed by plaintiff, a mining town called Amador City, exists, of about 400 or 500 people, which began in 1850, and reached the number mentioned in 1853, with many dwelling houses, and some forty acres cultivated by the owners of the Keystone mining claim.

On the 18th of June, 1870, one Henry Casey applied to the State authorities to purchase the half section of land on which this town and these mining claims were located, and a State patent was issued to his vendee, Gillette, Oct. 3, 1872.

The township in which this land lies was surveyed in the field in March, 1870, the survey approved Sept. 3, 1870, and the plat filed in the United States Land Office at Sacramento, Oct. 7, 1870. Within three months after this latter date the application of the defendant was made for patents for the three mining claims, and the patents were issued July 14, 1873.

The right to these patents, and the claim of the town of Amador City, were contested before the register and receiver, the commissioner of the General Land Office, and the secretary of the interior, by the State of California, and the parties claiming under her, and the decision was adverse to the title of the State.

The question, and the only question, presented for our consideration is very sharply presented by this statement of facts and by the acts of Congress pertinent to the subject; and it is, whether under these acts the title of the land in question became fixed and vested absolutely in the State of California, on the ascertainment by the survey of 1870, that it was part of the thirty-sixth section of the township in which it lies.

The act of March 3, 1853, (10 Stat. 244,) under which the right of the State of California to the school lands arises, has been the subject of construction in this court more than once heretofore, and the decision of the question before us requires a further critical examination of its provisions. The first five sections of it provide for the establishment of the offices of surveyor-general, two land offices, with registers and receivers, and for the organization of the general land system of the United States, including surveys; and it then proceeds to lay down the rules by which rights to the public lands may be acquired. The granting clause of the sixteenth and thirty-sixth sections of the public lands as thus surveyed, to the State of California, is as follows:

"SECT. 6. And be it further enacted, that all the public lands in the State of California, whether surveyed or unsurveyed, with the exceptions of sections sixteen and thirty-six, which shall be and hereby are, granted to the State for the purposes of public schools in each township, and with the exception of lands appropriated under the authority of this act, or reserved by competent authority, and excepting, also, the lands claimed under any foreign grant or title, and the mineral lands, shall be subject to the pre-emption laws of fourth September, eighteen hundred and forty-one, with all the exceptions, conditions and limitations therein, except as is herein otherwise provided; and shall, after the plats thereof are returned to the office of the register, be offered for sale after six months' public notice in the State, of the time and place of sale, under the laws, rules and regulations now governing such sales, or such as may be hereafter prescribed."

Sect. 7 of the act may as well be read here, as it is important to a true solution of the question under consideration.

"SECT. 7. And be it further enacted, that where any settlement, by the erection of a dwelling house, or the cultivation

of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections, before the same shall be surveyed, or where such sections may be reserved for public uses or taken by private claims, other lands shall be selected by the proper authorities of the State in lieu thereof, agreeably to the provisions of the act of Congress approved on the twentieth of May, eighteen hundred and twenty-six, entitled: 'An act to appropriate lands for the support of schools in certain townships and fractional townships, not before provided for,' and which shall be subject to approval by the secretary of the interior. And no person shall make a settlement or location upon any tract or parcel of land selected for a military post, or within one mile of such post, or on any other lands reserved by competent authority; nor shall any person obtain the benefits of this act by a settlement or location on mineral lands."

The twelfth section grants to the State seventy-two sections for the use of a seminary of learning, to be selected by the governor or some one appointed by him, in legal subdivisions of not less than a quarter section of any unsold, unoccupied, and unappropriated public lands: "*Provided, however*, that no mineral lands, or lands reserved for any public purpose whatever, or lands to which any settler may be entitled under the provisions of this act, shall be subject to such selection."

The thirteenth section also grants the State ten sections of land for the purpose of erecting the public buildings of the State, with the same proviso as the one to Sect. 12.

The proviso to the third section is also relied upon as indicative of the purpose of Congress in regard to the mineral lands of California. That section contains the authority under which the surveyor-general is to act in surveying the public lands in that State, and after investing him with the powers conferred on other surveyors-general, and prescribing some specific directions for the survey of private land claims, it is "*Provided*, that none other than township lines shall be surveyed where the lands are mineral, or are deemed unfit for cultivation; and no allowance shall be made for such lines as are not actually run and marked in the field, and were actually necessary to be run."

It is strongly urged by plaintiff's counsel that the language of the granting clause imports a grant *in præsenti*, and that

wherever by any survey of the government thereafter made, the location of the sixteenth and thirty-sixth sections of a township is ascertained, it establishes the title in the State from the date of the statute, namely, March 3, 1853. It is quite unnecessary to enter upon this question, which has been before us in so many shapes; for, if it be conceded that such would be the effect of the statute if there were no words of exception in the grant, Congress has, in nearly every case where the question has arisen, made such specific exceptions to the operation of the grant as to decide the matter without resort to the rule of construction asserted by plaintiffs.

Take, for instance, railroad grants. Besides the more general reservations from the grant, there is almost always found a provision that where, by the location of the road, the sections on each side of it, which would pass by the general terms of the grant, are ascertained, those which have been pre empted, sold, or otherwise disposed of shall not so pass, but the grantee may select other lands in lieu of those, which may be said in this manner to be excepted out of the grant.

This is true of the statute under consideration, and we may pass this branch of the argument by conceding that if the land in controversy is subject to the grant the title relates to the date of the act of Congress.

Defendants allege that it is not so subject to the grant, for two reasons:

1. That it is mineral land, and that the grant of school lands to the State does not cover any mineral land.

2. That by virtue of the seventh section such settlement and cultivation had been made on the land before the survey was made, as to take it out of the grant, and remit the State to the selection of other public land in lieu of this.

We will consider these in their order.

Very soon after the conquest of California and its cession to the United States by Mexico, it was found to be rich in the precious metals, and such was the rapid influx of immigrants from the Eastern States that the California population at the time it was organized as a State in 1850, was largely composed of mining camps and settlements engaged in mining these metals. As nearly all those mines were discovered on land the title of which was vested by the treaty in the government of

the United States, it became important to determine what course the government would take with regard to this new source of untold wealth. The Spanish government, to which this territory and much other, rich in precious metals, had once belonged, had instituted a system of laws concerning her mines by which private enterprise was invited to develop them, and a revenue secured at the same time to the crown, which made Spain, for a time, the richest of the civilized governments of the world. This system Mexico had inherited and perpetuated, and there were many American statesmen who believed that with the territory, we had acquired the laws which governed the production of gold from the earth. Others believed that, whether this were so or not, it would be a wise policy for the government to secure to itself a fair proportion of the metal produced from its own ground. But while Congress delayed and hesitated to act, the swarm of enterprising and industrious citizens filled the country, and before a State could be organized, had become its dominating element, with wealth and numbers and claims which demanded consideration.

Matters remained in this condition, with slight exception, until July 26, 1866, when Congress passed a law by which title to mineral land might be acquired from the government at nominal prices, and by which the idea of a royalty on the product of the mines was forever relinquished: 14 Stat. 251.

During this period, however, from 1849 to 1866, the system of the disposition of the public lands in general had to be introduced into California, and grants of land were made to the State for various purposes, also to railroad companies; and in all this the attention of Congress was necessarily turned to the distinction between mineral lands and the ordinary agricultural lands of the other western States to which similar laws had applied. This distinction is nowhere more plainly manifested than in this act of 1853. As we said in *Sherman* v. *Buick*, 93 U. S. 209, the main purpose of that act was to provide for the survey and sale of the public lands and for the right of pre-emption to the settler on them, and there was embraced in this clause of pre-emption the grant of the sixteenth and thirty-sixth sections to the State for school purposes. In the very sentence which contains this grant in

parenthesis, and while introducing the new principle that the public lands should be subject to the right of pre-emption, whether surveyed or unsurveyed, the mineral lands are excepted, in express terms, from this right and from public sale.

We say that this introduced a new principle in pre-emption law; for, except in a very few cases, no right of pre-emption had before existed until the lands were surveyed, so that the pre-emptor could designate by the description of the congressional survey the precise land to which his pre-emption attached.

But this right of pre-emption on unsurveyed lands, was by this statute to last but one year; and so careful was Congress to protect mineral lands from sale and pre-emption, that, as we have already shown by the proviso to Sect. 3 of the act, the surveyors were forbidden to extend their surveys over them.

The effect of this was as Congress intended it should be, that as no surveys could be made of mineral lands until further order of Congress, there could be no sale, pre-emption, or other title acquired in mineral lands until Congress had provided by law for their disposition. The purpose of these provisions was undoubtedly to reserve these lands, so much more valuable than ordinary public lands, and the nature of which suggested a policy different from other lands in their disposal, for such measures in this respect as the more matured wisdom of that body, which, by the Constitution, is authorized to dispose of the territory or other property of the United States, should afterward devise.

It is a strong corroboration of this view that Congress, in Sect. 12 of this same statute, giving the State seventy-two sections for a seminary of learning, declares that no mineral lands shall be taken under the grant, and makes the same reservation of its mineral lands in the grant for the erection of public buildings in the State.

We find a similar provision in the grant to the Pacific Railroad Companies, whose road it was known would pass through some of these mineral regions. By the fourth section of the act of 1864 (13 Stat. 356), it is declared that neither that act nor the act of 1862 shall be held to include in the grant

"any government reservation or mineral lands or the improvements of any *bona fide* settler on any lands returned or denominated as mineral lands."

As we have already said, Congress, after keeping this matter in abeyance about sixteen years, enacted in 1866 a complete system for the sale and other regulation of its mineral lands, so totally different from that which governs other public lands as to show that it could never have been intended to submit them to the ordinary laws for disposing of the territory of the United States.

Taking into consideration what is well known to have been the hesitation and difficulty in the minds of Congressmen in dealing with these mineral lands, the manner in which the question was suddenly forced upon them, the uniform reservation of them from survey, from sale, from pre-emption and above all from grants, whether for railroads, public buildings or other purposes, and looking to the fact that from all the grants made in this act they are reserved, one of which is for school purposes besides the sixteenth and thirty-sixth sections, we are forced to the conclusion that Congress did not intend to depart from its uniform policy in this respect in the grant of those sections to the State.

It follows from the finding of the court and the undisputed facts of the case, that the land in controversy, being mineral land, and well known to be so when the surveys of it were made, did not pass to the State under the school-section grant.

It seems equally clear to us that the land is excepted from the grant by the terms of the seventh section of the act of 1853.

In the case of *Sherman* v. *Buick* (*supra*), we have said in reference to this section that it was unnecessary to decide whether the improvements found on the land when the survey was made and the character of the person owning them should be in all respects those which are prescribed by the general pre-emption law. We are now satisfied that this section prescribes its own rules on that subject, and that whenever, at the time these sections are ascertained by the government survey, there is either a dwelling house or the cultivation of any portion of the land, on which some one is residing and is asserting claim to it, the title of the State does not vest, but

the alternative right to other land as indemnity does. It is only necessary to look to what we have said in *Sherman* v. *Buick*, of the fact that Congress had in view the rapid settlement of the country and the long time which might elapse before it could be known by actual survey where these school sections would be found, to see that a liberal construction must be given to the language by which Congress expresses its purpose to protect these settlements, buildings and cultivations, and that we have no right to add other qualifying incidents to the exercise of this right than those found in the statute. These are not the same required under the general pre-emption law, and we have no authority to import the latter into the new statute.

Some of the expressions found in *Sherman* v. *Buick* and in *Natoma W. & M. Co.* v. *Bugbey*, 96 U. S. 165, are supposed by counsel to convey a different meaning; but in the use of the words "pre-emption" and "pre-emptor," in reference to *this section of the statute*, it was not designed to imply all that was meant by those terms in the act of 1841 and its amendatory adjuncts, but to convey the idea of a settlement and a settler according to the terms of the statute under consideration. Nor is there anything in the principle announced in the latter case, that where a settler abandons his claim to hold the land against the State by virtue of such settlement or improvement, and acknowledges the title of the State by purchase, that his improvement or settlement can not be set up by a third person to defeat the title of the State recognized by the United States, which conflicts with what we have just said or with the defendant's rights in the present case. Here the settlement, building and cultivation have been continuous for twenty years, with constant assertion of claim. The same parties or their privies are still claiming it. None of them have accepted title under the State, or acknowledged its right to the land. The government of the United States has given them a patent founded on this very possession, use and occupation. Nothing in that opinion justifies the construction placed upon it by counsel, and the case is clearly inapplicable to the one before us.

We are of opinion that the settlement, building and cultivation found as facts by the Circuit Court, bring the case

within the provisions of the seventh section of the act of 1853, and necessarily render void the title asserted under the State by plaintiff.

It follows that the judgment of the Circuit Court is right, and it is accordingly

Affirmed.

MR. JUSTICE FIELD did not take any part in deciding this case.

1. The fact that lands contain mineral, not allowed to defeat the patentee of the State, which had received them from the government: *Ah Yew* v. *Choate*, 1 M. R. 492.

2. Construction of statutes relative to sale of school lands found to contain minerals: *Att'y-Gen.* v. *Smith*, 31 Mich. 360.

3. The act of March 1, 1847, providing for the sale of mineral lands, does not include section sixteen, which remains subject to the compact with Michigan: *Cooper* v. *Roberts*, 18 How. 173.

4. California school warrants may be located on mineral lands: *Nims* v. *Johnson*, 7 Cal. 110.

ADAM ET AL. V. THE BRIGGS IRON CO.

(7 Cushing, 361. Supreme Court of Massachusetts, 1851.)

Equity jurisdiction on bill by co-tenant of mine against surface owner, etc. A bill in equity brought by one claiming an estate in three undivided fourths of the mines in a certain tract of land, with the right to pass and repass, to dig for and carry away the ores, against the owner in fee of the whole of the soil of said tract, for digging and carrying away ore, and wasting and destroying the same, and forcibly resisting and disturbing the plaintiff in the exercise of his rights, is not within the equity jurisdiction of this court, either on the ground of a nuisance by a disturbance of the use of a right of way, or as showing the parties to be tenants in common of the mines.

[1] **Grant by co-tenant with reservation of ore, void.** In a conveyance by one tenant in common, of his estate in the land held in common, a reservation of his interest in the mines in and upon the land granted is void.

This was a bill in equity. The case was argued at September term, 1850, upon a demurrer to the bill, by G. ASHMUN and W. G. BATES, for the plaintiffs, and J. ROCKWELL and J. D. COLT, for the defendants.

The pleadings are sufficiently set forth in the following opinion, delivered at the same term, by SHAW, C. J.

This suit in equity was brought by the children and grandchildren of Samuel Forbes, who died in Connecticut, the place of his domicile, in 1827; and they alleged themselves to be devisees under his will, or the heirs of those devisees. They are all the descendants of Abigail Adam, wife of John Adam, and only daughter and heir at law of Samuel Forbes. It was objected by the defendants that the will of Samuel Forbes had not been filed in, or proved and allowed by any probate court in this commonwealth, and so that the plaintiffs could not claim title under it. An amendment was afterward allowed, by which the plaintiffs described themselves as heirs at law of Samuel Forbes. The

[1] *Duncan* v. *Sylvester*, 24 Me. 482; 41 Am. Dec. 400; *Smith* v. *Benson*, 9 Vt. 138; 31 Am. Dec. 614; 34 Id. 431, note.

defendants, having previously filed a general demurrer to the original bill, relied upon the same demurrer to the amended bill, and thereby admitted the claim of the plaintiffs as such heirs at law.

The bill sets forth that on the 21st of December, 1790, Jared Lane was the owner in fee simple of three undivided fourths of lot No. 62, in the second division of lots in Lanesborough (which lot contained one hundred acres), and was seized and possessed of the same, and then sold the same to John and Titus Wood and Jonathan Weed, and executed to them a deed thereof, in due form of law, reserving, saving and excepting from said grant a full and ample right to all the iron or other ores in and upon said premises, with the right of way to pass and repass, to dig for, to cart and carry away the same from said premises. Of this deed a copy is annexed and referred to as part of the bill. In comparing this averment with the deed, there is some variance in the phraseology. In the deed it is thus expressed: "Excepting, saving, and reserving a full and ample right to all the iron and other ore that may be found on the surface or in the bowels of the earth, of said one hundred acres of land, with liberty to pass and repass, cart and carry away the same." This lot of one hundred acres is further described as originally laid out to John Peck.

The bill further proceeds to aver that Lane occupied the premises, and took ore therefrom, and on the 22d of March, 1800, sold his said reserved and excepted rights and interest to Samuel Forbes, and by his deed conveyed all his said interest to said Forbes. It alleges that Forbes used said ore-bed during his lifetime, by himself, his servants and lessees, as far as his interest was concerned; and denies any adverse possession of the ore-bed until 1847.

The bill then avers that the defendant corporation, well knowing the premises, and being apprised in particular of the record title of Forbes, and the peculiar grant in the deed from Lane to Wood, Wood and Weed, with reservation and exception of the ores, as aforesaid, purchased a title to the soil, wherein the plaintiffs are entitled to an easement and other incorporeal rights, as aforesaid; and are now digging and carrying away the ore from said beds in a wasteful and unprofita-

ble manner, and intend great waste and destruction; and expresses the plaintiffs' fears that the defendants intend the entire destruction of said ore and irreparable injury to the plaintiffs. It alleges that a person attempting, under the authority of the plaintiffs, to exercise their incorporeal rights in the premises, was driven away by force by the defendant's servants, whereby the plaintiffs were disturbed in the exercise of their incorporeal rights, and great wrong was thereby done thereto, to the nuisance of the plaintiffs in the premises. The bill prays for an account, an injunction and general relief.

The case came on to be argued upon the demurrer, the defendants insisting upon the ground that this court had no jurisdiction in equity, because the facts set forth did not show a case of waste or nuisance. To constitute waste, they insisted there must be some relation, some privity of estate between the parties, and that no such privity was set forth in the present case. Whereupon the plaintiffs, by their counsel, stated to the court that they did not claim the jurisdiction on the ground of waste.

It was insisted in argument, that the case may be brought within the equity jurisdiction of this court on the ground that the bill charges and alleges a disturbance in the use of the plaintiffs' right of way, necessary to the use and enjoyment of their right to the ore and ore-beds.

It appears to the court that the substance of the plaintiffs' complaint is, that they were possessed of an estate in the ore and ore-beds of the whole tract of land described, to the extent of three quarters thereof, with the right to dig for the same, place it on the grounds and carry it away—an incorporeal hereditament indeed, but still an estate and real interest; that the defendants, being owners and in possession of the whole of the soil of said lot, denied their right to such ore and ore-beds, and right of opening them and taking and carrying away the ore, and forcibly resisted them and their servants in their attempts to do so. This, if true, might entitle the plaintiffs to an action of trespass, or trespass on the case, alleging or or not alleging force; but the interruption of the right of way is mentioned merely as incidental and dependent, and not as the gravamen of the complaint. Were the plaintiffs' right to

the ore and ore-beds, with the right of digging and carrying away the ore, admitted, and had they complained only of an interruption in going to and from the ore-beds, then the gravamen of their complaint, perhaps, would be a disturbance of their right of way only, and properly designated as a nuisance.

It was urged in argument, that the facts showed a case of tenancy in common of the mine, and therefore the court had jurisdiction. The objection to that view is that no such case is set out in the bill; it nowhere asserts that the defendants are tenants in common with the plaintiffs in the mines. If it were so, and if the relief sought were to obtain a special decree in the nature of a special partition, because the common right being in its nature indivisible in the ordinary mode it would be competent for this court to direct an equitable mode of using the right, which should do justice to both parties, the case would have stood very differently. On the contrary, the plaintiffs have rather studiously avoided alleging that the defendants had any interest in the mine, though they have alleged that the defendants had acquired a title in fee to the soil. The court are therefore of opinion that the bill does not present a case within the limited equity jurisdiction of this court.

After the delivery of the foregoing opinion, the plaintiffs having had leave to amend, amended their bill by averring that they were tenants in common of three quarter parts of the ore and ore-beds described, and of the right of opening and digging therefor in all parts of said lot, and of laying the ores on every part of the same, with a right to enter and carry the ores away, and that the defendants were tenants in common of one quarter part of the same; alleging that the plaintiffs had no complete and adequate remedy at law to obtain partition, and praying a decree regulating the mutual enjoyment of their respective rights by the parties, in the nature of a special partition.

To this amended bill an answer was made, to which a replication was filed, and evidence was taken on both sides, the material part of which is stated in the opinion.

The case was argued at Boston, in February last, by B. R. CURTIS and W. G. BATES for the plaintiffs, and by S. BARTLETT and J. D. COLT for the defendants.

SHAW, C.

The case again comes before the court on the question both of jurisdiction and of title.

Supposing the plaintiffs to have established their title to an undivided interest in the mines, ores and ore-beds, with the defendants, whether they be regarded as joint tenants, tenants in common, or partners, jurisdiction in equity of all questions and controversies between them, is conferred on this court, where there is not a plain and adequate remedy at law: Rev. Sts. c. 81, § 8. Supposing that there may be a right and estate in a mine, distinct from that of the soil in which it lies, there seems to be a peculiar fitness in resorting to equity, to adjust and regulate the mutual rights of the parties. It is manifest that partition can not be made by setting off the surface by metes and bounds, because the quantity and value of the mines and ores, and the capacity and facility of access for working them, bear no proportion to the area of the surface under which they lie. Indeed, in making partition at law, it has been found necessary to make special partition, directing the division of the profits, or the alternate enjoyment of the common property, as circumstances may require. In this commonwealth such an estate in mines is very similar to a right and interest in water powers and mill privileges, which are held to be suitable subjects, when held by several, to be brought within the equity jurisdiction of this court: *Bemis* v. *Upham*, 13 Pick. 169; *Bardwell* v. *Ames*, 22 Pick. 333.

The impossibility that each party should work his own undivided part of a mine, practically prevents that mode of enjoyment, and manifestly requires some judicial proceeding to secure their respective rights. The working of a mine, in which there may be many owners, and in which each may set out an aliquot part of his whole interest, is regarded in England as a species of trade and partnership which requires the interposition of equity jurisdiction to adjust controversies: *Jefferys* v. *Smith*, 1 Jac. & Walk. 298. So where real property, as in mines and ore-beds, is so situated that dower can not be conveniently assigned at law, equity will take jurisdiction: *Stoughton* v. *Leigh*, 1 Taunt. 402.

But the main question, after all, is, whether the plaintiffs

have proved any tenancy in common between themselves and the defendants in the ore and ore-beds.

We suppose it well settled that there may be a separate estate in mines and ores, distinct from that of the land in which they are found. But *prima facie*, the owner of freehold lands is entitled to all the minerals and strata of coal, clay, ore, lime, marble and the like, not as a separate estate, but as a part of the fee and inheritance, and they will all pass by descent, or by conveyance, without special designation. But this presumption may be rebutted, by evidence, showing a severance of the mines, and a distinct estate and interest in them, by grant or reservation; that is, the owner of the fee, having the general power of disposal, may grant all the ores and minerals, or any particular species of them, as lead, coal, marble, or the like, and still remain general owner of the land; or he may grant the land, and except and reserve the mines to himself and his heirs. Or such grant or reservation may be established by proof of such adverse, exclusive and long continued use and enjoyment of the mines against the general owner of the land, as would amount to satisfactory proof of a lost deed, containing such grant or reservation. But until such severance by the general owner, and the creation of such a distinct incorporeal right in the ores and minerals, is established by proof, they are to be deemed an inseparable part of the freehold, and pass with it in whole or in part, by deed or by act of law, as inseparably embodied in the freehold.

But when so severed by the general owner, and thus constituted a distinct estate, mines are still regarded as real estate, and the general laws regarding real estate will apply to them. They must be transferred by deed; contracts in relation to them are within the Statute of Frauds; dower is to be assigned in them: *Billings* v. *Taylor*, 10 Pick. 460; and all other rules regulating title to real estate, so far as they are applicable, will apply to them. In this commonwealth, in case of the decease of the owner intestate, they will descend equally to all the children; and in that respect are similar to the case of a descent in coparcenary to sisters in England. There, if the property consist only of mines, and these are incapable of convenient and separate partition, the respective rights of the owners will be regulated, and the profits divided, by a

commission out of chancery. Bainbridge on Mines, 116. It appears, therefore, that the rights to ores and minerals, though embraced in the fee, are capable of being severed by the owner, but have no distinct existence until severed; but when so severed, they are capable of being held, conveyed and transmitted, by will or inheritance, and of being a separate estate carved out of the fee.

It is contended on the part of the defendants in the present case, that the relation of tenants in common of these ores does not exist between the parties, because the deed under which the plaintiffs claim, although it conveys three fourths of the land only, excepts and reserves, in terms, all the iron and other ore under the whole hundred acres; and so, if the plaintiffs have any title, they are sole owners. All the conveyance out of which such reservation and exception are made, is of three undivided fourth parts only of the soil of the hundred acres. The literal form of the reservation is of the whole; but perhaps this can hardly be regarded as the true meaning. The form being that of a reservation, the ordinary construction must be that the reservation must be out of the grant of something, which, but for the reservation and exception, would have passed by it, and must, by implication, be so restricted. Had there been a previous severance of the estate in the ore from the general estate in the land, the terms of the exception might have been so construed. But on the contrary, it appears by the evidence that Lane, the grantor, had acquired a title in fee to three undivided fourth parts of the land, and no more. The case shows no evidence of any such anterior severance of the ore from the general right. On the contrary, the case stated for the plaintiffs is, and we believe it so appears from the deeds, that Peck, being the owner of the whole in severalty, conveyed one quarter to Martin, and three quarters to Caldwell; that Caldwell, by two deeds, conveyed the same three quarters to Smith; and that Smith, by two deeds, conveyed the same to Lane, who first made the exception and reservation of the ores in his deed to Wood, Wood and Weed, under whom the plaintiffs claim. This deed, with its exception and reservation, is relied on as a severance.

This brings us to the specific ground of defense, which is,

that the attempt to sever the ore from the general interest in the land is void, as a grant by a co-tenant, whether it be regarded as an incorporeal hereditament or as a distinct estate; because it is an attempt to create a new and distinct tenancy in common between the one co-tenant and others in distinct parts of the common estate, which is contrary to the rules of law. And the court are of opinion that this is a good ground of defense.

It is entirely settled as a rule of law, in relation to land, that the conveyance of any separate estate by a tenant in common, by metes and bounds, is void as against the co-tenants, and is available only by way of estoppel against the grantor and his heirs: *Bartlet* v. *Harlow*, 12 Mass. 348; *Varnum* v. *Abbot*, 12 Mass. 474; *Blossom* v. *Brightman*, 21 Pick. 283-285; *Baldwin* v. *Whiting*, 13 Mass. 57; *Peabody* v. *Minot*, 24 Pick. 329. The ground upon which this doctrine is established is, that a tenant in common of an entire estate is entitled, on partition, to have his purparty assigned in one entire parcel, according to his aliquot part. The respective co-tenants may convey their shares to one or many grantees, as they please, so it be of the entire estate; because, whether there be one or many co-tenants, each may still have partition, which is inseparably incident to an estate in common, and have it in one parcel, and of like kind and quality with the estate which he holds in common. I have a moiety; my co-tenant has a moiety. He may convey a quarter of the whole estate to one, an eighth to another, a sixteenth to another, and so on indefinitely, letting in other co-tenants with me. But all being seized of aliquot parts in the same estate, and of like kind and quality, my right to partition is not disturbed by the number of co-tenants. But if he could convey his aliquot part in specified parcels of the estate, he might diminish the value of my right, if not render it worthless.

We have seen that it is competent for a general owner not only to divide his estate by metes and bounds, and convey one parcel to one, and one to another, but also to divide it in another mode, by conveying mines to one, and quarries to another, and retain the general interest in the soil; and these special estates, when thus legally severed, may pass to heirs, devisees and purchasers, and be attended with all the incidents.

and be governed by the common rules applicable to the holding of real estate.

But if the owner of an undivided part of a real estate could do this, it would be attended with all the inconveniences to the co-tenants arising from a conveyance of his interest in a particular part by metes and bounds. Suppose the defendants had not acquired the three quarters of the general estate, which was conveyed by Lane to Wood, Wood and Weed, they would still have had one quarter of the entire estate, under their anterior title, with all the ores, minerals and quarries, opened or unopened, known or hidden, and would have been entitled to a partition, which would have given them a similar title to a quarter part in quality and quantity, by metes and bounds, so as to have an estate similar in character, to wit, a fee simple of such quarter, set off and divided, with all its incidents of mines, quarries and ore-beds, within those limits. If Lane's deed, conveying three quarters of the general estate to Wood, Wood and Weed, reserving three quarters of the ore and ore-beds to himself and his heirs, could avail against his co-tenants, the owners of this entire fourth part of the whole estate, with all its incidents unimpaired, with all its ores and mines unopened and unsevered, would be compellable to divide the soil, or general estate, with one set of co-tenants, and the mines and ores, with another or many other sets of co-tenants. Such a result would be attended with all the mischief and inconvenience arising from the act of a co-tenant in attempting to convey his undivided part in a particular parcel, instead of an aliquot part in the whole common estate. The same reasons, upon which it is held that such a conveyance is void against co-tenants, will also avoid the act of a part owner in attempting to parcel out rights, in their nature indivisible, in definite portions of the inheritance, as the mines to one, and the general estate to another. For these reasons we are of opinion that the reservation in the deed of Lane to Wood, Wood and Weed, Lane being himself a tenant in common of three fourths of the entire freehold estate concerned, was void, and that his subsequent deed to Samuel Forbes was void also, and that no interest or estate in the ore and ore-beds passed by it.

This view of the effect of the deed, which lies at the

foundation of the plaintiffs' title, renders it unnecessary to consider whether the reservation was personal to the grantor for want of words of limitation to his heirs and assigns, or whether, by implication, a reservation out of a grant in fee was the reservation of an inheritable interest. It is also unnecessary to consider many other questions, both of fact and of law, which have been incidentally discussed.

Decree accordingly for the defendants.

ROWE v. GRENFEL.

(Ryan & Moody, 396. In the Common Pleas, England, 1826.)

[1] **Presumption of severance from adverse user.** In trover for copper ore raised under the plaintiff's land, *held:* that the presumption that the minerals followed the fee in the land might be rebutted by the absence of enjoyment of the minerals by the plaintiff and their user by persons not the owners of the soil.

Trover for 100 tons of copper.

PELL, WILDE, Serg'ts, C. F. WILLIAMS, ERSKINE and CARTER, for the plaintiff.

ADAMS, SELWYN, R. BAYLY, MANNING and TUCKER, for the defendant.

The defendant was proved to have converted to his own use a certain quantity of copper which had been raised under Lemellyn Moor; and to prove that this copper belonged to the plaintiff, it was shown that Lemellyn Moor was part of an estate of thirty-six acres, called Nansmellyn. The plaintiff became possessed of this estate in 1814, as the witness said, by purchase, but no deeds nor payment of purchase money were shown. From 1814 up to the present time he had occupied and farmed the estate; had cut down and planted trees, and had built and pulled down outhouses, and in fact had had undisputed enjoyment of the surface of the land. But at the time of his coming into possession there was a shaft for tin

[1] *Rich* v. *Johnson*; *Hodgkinson* v. *Fletcher*, 1 M. R. 173.

and one for copper, which had recently been worked by certain persons called the Palk Company, who had raised tin from it. In 1820 the plaintiff sunk two shafts and raised some copper, which the East Crinnis Adventurers, who were the real defendants in this case, seized and sold, and continued to seize all the plaintiff raised until 1821, when they took possession of the mine, and continued working it and selling the copper up to the time of the action.

Upon the plaintiff's counsel closing his case here, ABBOTT, Ld. C. J., said that the plaintiff must be called; but on Pell, Sergeant, pressing that the case might go to the jury, in order that he might have the benefit of a bill of exceptions to the direction, his lordship proceeded to sum up:

The question for you to consider in this case is, whether the ore raised under Lemellyn Moor belongs to the plaintiff; and this action is maintainable in two respects; either possession, which as against a wrongdoer is sufficient; or if the plaintiff was not in possession, then in respect to his right or title. Now, in regard to the first question, it can hardly be contended that the plaintiff had ever any actual possession, the ore purchased by the defendant having been raised by persons adverse to him. If that be so, you are next to consider had he right or title. Speaking generally, the possession of lands is evidence that the possessor had the highest interest known to the law, and a fee simple will be presumed; and in various cases it will be presumed that the fee simple of the land carries with it the right to the minerals; but that presumption is not universal, because in mining countries the right to the minerals and the fee simple of the soil are frequently in different persons; the two things are frequently for many generations separate; and we know that in conveyances of lands the minerals are not uncommonly excepted. It is for a jury, therefore, to exercise their discretion on all the circumstances before them to ascertain this question. It appears that the plaintiff came into possession of this estate in 1814, and from that time has held it under circumstances from which you may certainly presume the fee simple of the land to be in him; and then you are to say whether you will also presume a title in him to all the minerals under the surface. Now, you find that shortly before the plaintiff came into possession, some other persons, not the owners of the soil,

had sunk shafts, had worked the mines, and, amongst the ore, copper in small quantities had appeared. In 1820 the plaintiff sinks a shaft for copper and raises a few tons. This the East Crinnis Company take away, and from time to time carry what further he raises until 1821, when they take possession of the mine and have continued working it ever since.

Now, looking at the possession and enjoyment of the land, and at the want and absence of enjoyment of the minerals, both before and after the plaintiff became possessed of the land, it is for you to say whether he has made out to your satisfaction that these minerals belonged to him.

Verdict for the defendant.

STEWART ET AL. V. CHADWICK ET AL.

(8 Iowa, 463. Supreme Court, 1859.)

Contract of administrator inures to heirs. The contract of an administrator such as he had authority to make inures to the benefit of the heirs.

Possessory "claims" are personal property, do not rank above estates for years, and contracts relating to them are therefore within the power of an administrator.

[1] **A severance of the mineral** and surface estates is consistent with the nature of land and qualifies the maxim *cujus est solum ejus est ad coelum.*

[2] **Extrinsic evidence as to severance.** In the construction of a contract inferring the severance of the surface and subsoil rights, extrinsic evidence is admissible to show the use to which the land is or may be applied.

Severance of mineral held in trust. Where W. and C. each claimed a "claim" right in mineral land, and C. and the administrator of W. entered into an agreement by which the said C. agreed to give to the said W.'s estate one sixth part of all mineral raised upon the land; that he would enter the land from the United States, and was to receive the surface, or soil, of said property; that if he worked the ground, he would pay to said estate one sixth of the mineral; and that if the estate worked or discovered any mineral, it was to have the privilege to do so. without paying any part to any person: *Held*, 1. That C. was to hold the soil, or surface—the agricultural use of the land—and that the estate or heirs of W. held the mineral right; 2. That C., when he caused the land to be entered, held the mineral right in trust for the heirs of W.

[1] *Jones* v. *Wagner*, 13 M. R. 690.
[2] *Hartwell* v. *Camman*, 3 M. R. 229.

Purchaser with notice of trust. A purchaser of real estate, with notice that his grantor holds the title as trustee, stands in the place of the grantor, and is chargeable with the trust.

Competency of witness. One who conveys land by deed of general warranty is a competent witness for the complainant in a suit against the grantee, to show that by mistake the deed conveyed a greater interest than the grantor possessed.

Evidence of the assertion of a claim, distinct from its proof. The knowledge which an administrator obtains in the discharge of his duties may be sufficient to establish the fact that the estate asserts a certain claim, though it may not be sufficient to fix the validity of the claim, and is not hearsay evidence.

Purchaser with notice of settlement. An agreement having been made with the express intention of settling prior disputes, a party can not go behind it, and those taking under such party with notice of the contract take subject to it.

Dower in estate held in trust for husband. A widow has no estate, as such, in an interest in real estate held in trust by another, for her husband. Upon the death of the husband the right descends to his heirs at law, and when they have recovered the estate, she makes her claim of dower against them.

Appeal from the Dubuque District Court.

This bill in equity was filed by Joseph and Ann Wilson, children and heirs of Abraham Wilson, deceased, and minors, suing by W. G. Stewart and Jesse P. Farley, their guardians, and William G. Stewart, with Caroline, his wife, who was the widow of the said Abraham Wilson, to enforce the conveyance of a certain interest in mineral lot No. 148, in the county of Dubuque, etc.

Prior to the year 1846, Abraham Wilson died, possessed of a "claim," according to the custom of the country, in a tract of land which was afterward known as mineral lot number 148, and was also otherwise described. On the 12th of October, 1846, Heman Chadwick entered into an agreement with Robert Waller, as administrator on the estate of Abraham Wilson, to the effect that "the said Chadwick agrees to give to said Wilson's estate, one sixth part of all mineral that may be raised on a certain piece of mineral ground, containing six acres, more or less (describing it as bounded by adjacent owners); the said Chadwick agrees to enter said described property from the United States, and said Chadwick has to receive the surface or soil of said property. If said Chadwick works said ground, he will pay one sixth of mineral to

Wilson's estate as above described; or if the administrator works or discovers any mineral, the estate is to have the privilege to do so, without paying any part to any person whatsoever." The agreement concludes as follows:

"This day settled as a claim formerly in dispute, but this day settled between us, said parties."

The bill alleges that Chadwick caused the land to be "entered," at the land office by G. L. Nightengale, and on the 30th of April, 1848, took a deed of the whole to himself, without reserving the mineral right to the heirs of Wilson; and that on the 26th of June, 1850, Chadwick conveyed the entire land and interest to the defendant, Collins. It is further averred that the conveyance of the whole to Collins, without reserving the interest of Wilson's heirs, occurred through mistake, which petitioners pray may be reformed and corrected in this respect. The bill also charges that Collins had notice and full knowledge of the interest of the said Abraham Wilson and of his heirs, at the time of the conveyance to him, and that he took his deed under cognizance of that interest. The petitioners then pray that the title to the mineral right in the said lot may be declared to be vested in them; that the deed from Chadwick to Collins may be reformed and modified so as to conform to the agreement and intention of the said parties; and that the respondents be required to convey the said mineral right to the petitioners.

Collins demurred to the bill, and answered, denying notice, etc., and the cause was heard upon petition, answer and evidence. The decree of the court was entered in favor of the complainants, from which the respondents appeal.

D. S. WILSON, for the appellants.

W. T. BARKER, for the appellees.

WOODWARD J.

The respondent, Collins, demurred to the bill, and the causes assigned will be noticed without a formal statement of them. That the contract with Chadwick was made by Waller as administrator of the estate, and not by the

complainants themselves, is not a controlling objection. The minor heirs are the real parties in interest, and a contract by the administrator, relating to the estate, such as he had authority to make, would inure to their benefit after it should be ascertained that it was not required for the creditors. We are not aware that it has been determined whether those possessory rights, termed "claims," are real or personal estate. Contracts in relation to improvements upon them have been recognized and the interest in them has been regarded as a possessory one; and being possessory only, they could not take rank above estates for years, which go to the administrator. For this reason a contract concerning an interest in them must be regarded as relating to the personalty, and therefore as pertaining to the administrator, and this may be still more clearly true when the contract is made with the administrator. The early statutes do not imply that these interests were realty; the earliest were those of Michigan and Wisconsin, extended over this territory, which had reference to a state of things existing then, primarily; and when our own first acts were passed, recognizing real estate, there was such property here, as there were sales by the United States in 1838 and 1840. Besides, all these were in anticipation of a condition of things which was as sure to arise as that population would take possession of the land; so that it is entirely unnecessary to adopt the forced construction that these laws, in assuming the existence of real estate, recognized possessory "claims" as such. See *Bowman* v. *Torr*, 3 Iowa, 571. As personal property, then, the administrator had rights in connection with it; and as a right or an interest, whether real or personal, it would descend to the heirs.

No difficulty exists in reference to the description. The tract is described in different modes in the agreement and the petition, and perhaps in the deeds, but they are shown to be the same parcel. At the latter dates the numbers took the place of other and more detailed description.

With reference to certain other causes of demurrer, we remark, that it is not essential under any rule of law, that the petition should show the ages of minor heirs. And the omission to inventory a claim, or other interest, does not operate to forfeit the right of the heirs, in any portion of the

estate. The respondent fails to refer us to any provision of law requiring the heirs to obtain authority from the Probate Court to prosecute for the recovery of an interest, which they may regard themselves as entitled to. Positions so unfounded as these are noticed only as an indication that they have been listened to, and not because of any merit requiring attention.

There is more force in the exception that the agreement does not bind Chadwick to convey to Waller, the administrator, or to any other person, any interest in the land mentioned. Whatever the intent of the agreement, it is not clearly manifested. It contains provisions or expressions, tending to either one of two or three constructions: as, whether the intent was to give a permanent and substantial interest to the estate, or a usufruct; or whether to give one of these to Chadwick. Extrinsic evidence is properly resorted to, in order to learn the usages of a business, or the use and nature of certain kinds of property, viewed with reference to its application, or the interest to which it may be subservient. It was so done in this case; and from the testimony we learn, that notwithstanding the general truth of the maxim, *cujus est solum ejus est ad coelum*, and that he who owns the surface, also owns the center, yet in mineral lands the surface—the soil, as adapted to cultivation—may be separated from the mineral right or the right to dig under the surface for ore. We perceive that it is consistent with the nature and adaptation of the property, that one person should hold the one of these rights, whilst another person is interested in the other.

Under the above explanation of the different uses of mineral lands, we are permitted to conceive that the contracting parties may have intended thus to divide the use or interests in the land in controversy. There had been a difference in relation to the tract; and the parties in their contract say in relation to it "this day settled as a claim formerly in dispute, but this day settled between us, said parties." It presents some difficulty that the contract indicates a possible right in Chadwick to dig mineral, in providing that if he worked it, he should pay one sixth to the estate; but on the other hand, this rentage implies the relation of landlord of ownership in the estate; and this idea is much strengthened by the provision that if the

administrator (or the estate) work, or discover mineral, they do it without paying any part to any person whatsoever. This clearly indicates the superior right, and the first right of choice, whether to work the mineral or not. One other provision settles the rights of the parties. Chadwick is to enter the property from the United States, and he "has to receive the surface, or soil, of said property." The testimony before referred to, shows how the interest in the surface may be separated from the entire interest, or fee. It is clear that Chadwick was to hold the soil, or surface—the agricultural use of the land; and the estate, or heirs of Wilson, the mineral right, this was the division made to settle the controversy in relation to the claim. The next question which occurs is, what was to be the condition of Wilson's right and interest? If Chadwick held the title he would evidently hold the mineral right, in trust for those representing Abraham Wilson. But a trustee does not possess the right to continue to hold the trust-interest in himself, unless this is so provided in the creation of the trust. A conveyance of it to the *cestui que trust*, may be enforced by a court of equity. This is the condition of the right between Chadwick and the heirs and administrator of Wilson. Chadwick, however, has conveyed to Collins, without reserving the interest of Wilson, in terms. Yet if Collins has taken with a knowledge of the trust, or the interest in Wilson, he is chargeable with the trust, and stands in Chadwick's place.

The court did not err, then, in overruling the demurrer; and we come to the next question, which is, whether Collins had the notice above named; and it is our opinion that he had. The testimony of Chadwick is clear and definite on this point; it relates to the time of making the contract to sell to Collins. And the testimony of O'Brien confirms that of Chadwick showing that Collins did not claim to own the entire interest in the land, but the surface only; and this very claim of the soil alone, concurs with the supposed interest of Chadwick, and which he should have sold to Collins. Again: Waller's statement that Chadwick told him that he had conveyed only the surface, coincides with Chadwick's that he informed Collins. It is true that it was not correct—that is, that his deed did carry more; but this declaration apparently indi-

cates his intentions, and may have expressed what he then thought he had done.

The present is a suitable occasion to advert to the objections to the testimony. The defendant will perceive that his exceptions go to the extent of saying that the testimony of no one of four witnesses is to be received, although none of them is impeached in respect to his character, reputation or standing. It is true that there are some incongruities; but it is to be remembered that the witnesses testify in respect to transactions running back several years—some of them reaching even to eighteen or twenty years; and that the principal inconsistencies relate to dates, and those not of material importance in the case; on the other hand, in the important facts the witnesses support each other, circumstances concur, and the written instruments, which do not deceive, also lend their support. Thus, for instance, the agreement between Waller and Chadwick gives support to the testimony of those witnesses, in so far, at least, as it shows that there was a controversy concerning the claim, and that that was designed as a settlement of it. And similar remarks might be made relative to other portions of the case.

Again, some of the testimony, if measured by strict rules, was not admissible, but no objection was made at the time so that the fault of question or answer might be corrected; and besides, both parties pursued a similar course, and seem to have aimed at obtaining all the facts, rather than the strict observance of rules.

The objection to Chadwick, as arising from interest, is not well founded. In testifying for the complainants, he is acting against his interest. Having given a warranty deed to Collins, covering the entire estate in fee, his interest would lead him to support that conveyance in its full extent. His testimony in relation to the manner in which Nightengale should have obtained the description of the land, does not necessarily indicate anything worse than carelessness; and that concerning the commissioner goes no further than to manifest vagueness and looseness of idea in reference to them and their duties. The exceptionable features of his testimony on these subjects, and in reference to the reading of the deed, are susceptible of some extenuation from the circumstance of his illness and suffering

at the time, in consequence of an injury received in the overturning of a coach. The testimony of Smith is intended to impeach Chadwick, and being objected to, is not admissible, the party having laid no foundation in his examination of the latter.

But further, suppose Chadwick did intend to convey the whole fee to Collins, and was false in saying that he had not or did not intend to; what effect has this upon the case? If he was chargeable as with a trust, and Collins knew it, his intent to deceive either one or the other, is of no avail in the present inquiry.

We can not participate with counsel in their astonishment or incredulity, as to the testimony of Leemon. He says that the signature to the agreement is his, but that he has no recollection of the transaction, not even of putting his name to it, and he remembers nothing, and knows nothing about it, except that the signature is his. This is not remarkable. Twelve years before he testified, he put his hand, as a witness, to an instrument in a transaction in which he had no concern, and it is far from incredible that he should recollect nothing, and should know nothing about it, save that his signature is set to it.

The objection to Waller's testimony in relation to Wilson's claim in the land, that it is hearsay, is urged without proper consideration. It is not hearsay, although his knowledge was not original and direct. He came into connection with the estate as an administrator, and the knowledge he obtains of the interests of the estate, in the discharge of the duties of such a place, may be termed official, in some sense or degree, and, however obtained, is competent to establish the fact that there was a claim, or such a demand, belonging to, or set up by the estate, though it may not be sufficient to fix its original truth and validity. We speak now of the degree or kind of his knowledge, and not of his competency as a witness.

The disposition of the demurrer, and the above remarks on the construction of the agreement, embrace the most important questions of the cause, but yet there are some others which demand attention.

The agreement having been make with the express intent

of settling prior disputes, the defendant can not go behind it, as in some respects he seeks to do. Those taking under Chadwick, with notice of the contract, take subject to that settlement. If Sleator and Chadwick permitted the claim to become forfeit by non-user, they holding lease under Waller, could not set up such forfeiture against him, and obtain a new right as opposed to him, by virtue of the forfeiture. They could not derive a benefit from a forfeiture created by their own act. But, even if this were not so, the agreement, made subsequently, shuts off that question. Whether viewed in relation to this or any other position, Chadwick can not controvert the interest of Wilson's heirs, nor can one holding under him, with notice.

The respondent claims the benefit of new matter set up in his answer, and to which there is no replication. He points out no facts the benefit of which he asks, and we are unable to perceive anything of importance, or which would aid his cause, which is not embraced in the bill and in the answer responsive.

Neither is the cause one which should be classed as a stale demand. Regarding its age alone, we should hardly be justified in so treating it; and it is shown that the administrator repeatedly called upon Chadwick for a deed, which he as often promised; and this request was made even after his discharge, which would bring it as late as the year 1851 or 1852. This was at the request of the guardians.

Then, it is to be borne in mind that the petitioners are still minors, and the court can see nothing to justify it in setting the cause down as one upon a stale demand. This is remarked without considering whether a claim to real estate or to an interest in it, as this became upon the purchase of the title, can be treated as such.

The foregoing remarks are believed to touch all the important questions made in the cause. We have arrived at the conclusion that Chadwick held an interest in the land as trustee for Wilson and his heirs; that when Collins purchased he had knowledge of this interest; that it descended to the heirs of Wilson; that they had no occasion to go to the probate court for leave to prosecute this right; that it was not lost, though the administrator omitted to cause it to be entered in the inventory and returned to the probate court; and,

finally, that Collins is in equity bound to convey this interest to the petitioners, Joseph and Ann Wilson. The widow of Abraham Wilson has no estate, as such, for which she can sue at present, as in this case. The right descends upon the heirs at law, and when they have recovered, she makes her claim of dower upon them. This suit is not to settle a right to dower, but to determine the right or title between Collins on the one hand, and the estate of Wilson, represented by his heirs, on the other.

The decree of the district court is affirmed.

BUCKLEY v. HOWELL.

(29 Beavan, 546. The Rolls Court, 1861.)

Power not authorizing severance. An absolute power of sale or exchange of "all or any part" of lands does not authorize a severance of the minerals by the trustees: *i. e.*, it does not authorize a sale with a reservation of the minerals.

[1] **Timber and minerals, allied.** The law of timber and of minerals is, in principle, the same.

This was a special case for the opinion of the court under the following circumstances:

The testator, the Rev. Henry J. Randolph, by his will dated in 1856, appointed and devised all his lands in the manor and parish of Yate and elsewhere (including therein a piece of land called Normead) to trustees for 500 years, upon trusts for payment of debts and certain legacies, and subject thereto and to an annuity of £100 a year, to the use of his son, William Cater Randolph (the present devisee for life in possession) and his assigns, for his life, without impeachment of waste, with divers limitations and remainders in strict settlement.

The testator gave to the persons in possession power to demise for twenty-one years "all or any part of the said manors, messuages, lands, hereditaments and premises hereinbefore respectively appointed and devised, and all or any of the *mines* and quarries now opened or hereafter to be opened."

[1] See *Findlay* v. *Smith*, 13 M. R. 182; *Jesus College* v. *Bloom*, 3 Atk. 262.

The will contained the following power of sale:

"Provided always, and I do hereby further declare, that it shall be lawful for my said trustees," etc., etc., "at any time or times after my decease, at the request in writing of William Cater Randolph, during his life, and after his decease at the request in writing of the person or persons who shall, for the time being, under the aforesaid limitation, be entitled for life, or as tenant or tenants in tail male, or in tail general, to the actual possession of the rents and profits of the said manors, lands, tenements, hereditaments and premises hereinbefore respectively appointed and devised, if such person or persons, so for the time being entitled as aforesaid, shall have attained the age of twenty-one years; but if such person or persons so for the time being entitled as aforesaid shall be a minor or minors, then during his, her or their minority or respective minorities, at the discretion of my said trustees," etc., etc., "*absolutely* to *make sale* of or to convey, in exchange for or in lieu of any other freehold or copyhold manors, lands and hereditaments to be situate in *England* or *Wales*, *all or any* part or parts of the manors, lands, tenements, hereditaments and premises hereinbefore respectively appointed and devised, and the inheritance thereof. And upon any such sales or exchanges, to make, in respect to the manors, lands, tenements and hereditaments sold or given in exchange, and to take the manors, messuages and hereditaments received in exchange subject to such special or other conditions as to title or otherwise as to my said trustees," etc., "shall seem reasonable."

And for the purpose of effecting any such sales or exchanges he empowered his trustees to revoke the uses of his will and to declare new uses. The purchase money was to be applied in discharge of incumbrances on the estate, or in the purchase of freehold or copyhold lands of inheritance situate in England or Wales.

The testator died in 1860.

The plaintiffs, as trustees of the will, and purporting to exercise the power of sale contained in it, at the request in writing of William Cater Randolph, caused certain portions of the freehold estates appointed and devised by the will, and situate in the manor or parish of Yate, to be put up for sale, by auction on the 7th of August, 1860, in seventeen lots, subject to certain conditions of sale.

Lot 1 consisted of the close of pasture land called Normead, containing 4a., 3r., 27p.

One of the conditions of sale was as follows:

"Each lot (except lot 8) will be sold subject to an exception and reservation of the coal mines and veins of coal, metals and minerals, except stone, in, upon and under the same, and of full liberties of working and mining for the same, according to a form of exception and reservation following these conditions, which is to be inserted in the conveyances to the purchasers, and which will be read at the sale if required."

At the end of the conditions was the form of exception and reservation referred to in the sixth condition, and which was as follows: "Except and always reserved out of the grant and conveyance herein contained, all mines, metals and minerals, except stone, of what quality soever, already or that may be hereafter found in, upon or under the said hereditaments hereby assured, with full liberty of ingress, egress, and regress, at all times, for the person or persons for the time being, to such excepted mines, metals and minerals, and his and their agents, servants and workmen, to mine and search for, land and carry away the same with or without wagons, carts and other carriages, horses or other cattle, and with the liberty of making and erecting any engines, buildings, roads or works in, on or under any part of the said hereditaments hereby assured, in order to search for, land, take and carry away the said excepted mines, metals and minerals, and afterwards of removing any such engines, buildings or works, or any part or parts thereof, rendering unto the purchaser, his heirs, executors, administrators or assigns, compensation for the damage (if any) that may, under this exception and reservation, from time to time hereafter be done to the surface of the said hereditaments hereby assured, or any part thereof."

The defendant became the purchaser of lot 1, and signed a valid contract in writing annexed to the particulars and conditions of sale, agreeing to complete his purchase agreeably to the conditions.

The defendant, however, objected to complete his purchase, on the ground that the plaintiffs were not authorized, under the powers of sale, to sell any of the lands and hereditaments

with an exception or reservation of the mines and minerals, in, upon or under the same, and that the sale by the plaintiffs, with such exception and reservation as was provided by the conditions, was not a valid exercise of such power. And the defendant insisted that the plaintiffs could not, in consequence, make a good title to the lands comprised in lot 1.

The plaintiffs insisted that this objection was unfounded.

The defendant was satisfied with the plaintiffs' title on all other points except the one above mentioned.

The special case contained the following statements:

"Coal mining has been, for many years past, carried on in the parish of Yate, and in the adjoining parishes of Westerleigh and Pucklechurch, and the Bristol coal field is contiguous to the two last mentioned parishes. The testator and the previous owners of the manor of Yate and other estates devised and appointed by the testator's will, have, at different times, granted various mining leases of the coal and other mines and minerals, under portions of the estates at Yate appointed and devised by the testator's will."

The plaintiffs and defendant prayed the opinion of the court upon the following questions, viz.:

"*First.* Whether the plaintiffs are authorized, by the power of sale, or the other powers contained in the will of the testator, to sell the said land and hereditaments called 'Normead,' comprised in lot 1, with such exception and reservation of the coal mines and veins of coal, metals and minerals and, generally, with such exception and reservations as provided by the above conditions, or with any other and what exceptions or reservations.

"*Second.* Whether the plaintiffs have power, under the same will, to sell the said land and hereditaments, otherwise than together with the mines and minerals thereunder."

Mr. R. PALMER and Mr. EVERETT for the trustees.

Mr. FOLLETT and Mr. C. HALL for the purchaser.

THE MASTER OF THE ROLLS.

In this case there is an absolute power of sale or exchange of

any part of the property; but I think that the land can not be sold, under this power, without including the minerals as part of the property sold. I think, upon principle, that a severance can not be made, and that the question is settled by authority.

The principle is this: The power must be so exercised as not to give the tenant for life more out of the property subject to the power than he would have had if the power had not been exercised. The mines are part of the *corpus*, which the tenant for life, being unimpeachable for waste, is entitled to win and sell, and thus obtain the profits of; but the surface land being sold, the purchase money is to be re-invested in land, and if an estate with valuable minerals under it were found to be the most eligible mode of investment, the tenant for life would get the minerals from under the two estates. It is clear that this could not be prevented, for the court could not refuse to allow the purchase money to be invested in the purchase of an estate with minerals under it, if such a purchase were valuable and beneficial for the persons entitled; neither could it restrict the purchase to lands of which the mere value was agricultural, or if not, prevent the tenant for life from working the mines.

It is obvious that the court could not exact from the tenant for life any promise not to purchase any land of that description, nor, if exacted, enforce it. It is the same in this case as in that of timber; no promise or undertaking as to re-investment would be of any avail, nor could it be enforced by this court.

I think the principle clear, that in selling a piece of this land you must sell the whole of the minerals under it as well as the surface of the land itself.

The decided cases illustrate that principle, and are clear upon the subject. The principal case is *Cholmeley* v. *Paxton*, 3 Bing. 207. It was discussed and established both at law and in equity, and it was affirmed by the Exchequer Chamber as regards the legal question, and by the House of Lords as regards the equitable point.

It is reported in several books on various points, but on those which are the most important at law, in 3 Bing. 207, and 10 B. & C., page 564; it is reported on the equitable ques-

tions in 1 Russ. & Myl. page 418, and in 1 Cl. & F., page 61, before the House of Lords. It is also reported on collateral points in 3 Russ. page 565, when an application was made to Lord Eldon for an injunction to restrain the issue of execution on a judgment which had been obtained at law, and there the several instruments are set forth. From these it appears, as well as from the judgment of Best, C. J., in *Cholmeley* v. *Paxton*, that the power of sale was an ordinary power of sale similar to that in the present case, viz., a power to sell the whole or any part, in the discretion of the trustees.

The way in which Best, C. J., states the power of sale in that case is this (3 Bing. 212): "The power of sale in the will is in these words: 'To make sale and dispose, or to convey in exchange of or for any other manors, all or any part or parts of the messuages aforesaid, with the appurtenances, either together or in parcels, for such price or prices in money, or any other equivalent, as to them, the trustees, should seem reasonable.' The trustees must substantially comply with the authority given to them; if they do not, the act done by them will not be a good execution of the power, and the conveyance will be altogether void. They might sell different parcels of the estate at different times, and make separate conveyances of each parcel so sold; that is the extent of their authority. They can not sell part of a parcel. They must not sell the land without the timber, or the timber without the land on which it grows. The sale of the one without the other would be a cause of confusion and litigation, which could not fail to be injurious to both the vendor and vendee, and such a sale is a material departure from the power, injurious to the reversioner, and therefore altogether void." It is not necessary to refer further to the observations of the chief justice. When the case came before the Exchequer Chamber all the four judges who expressed any opinion considered it right.

Lord Tenterden said (10 B. & C., page 570): "It is not material for us to consider whether he could, by law, have cut down trees to the extent of those which he has sold, because my opinion is, that according to the terms of the testator's will, if the tenant for life thought fit to consent that the estate should be sold, he was bound to suffer it to be

sold in the State in which it was at that time, and not to sever from it the timber or other trees, but to let the whole go together." In fact to sell the land in the present case without the minerals would be very much as if in the other case the land had been sold reserving to the tenant for life the timber, with power to him to enter and cut it as he should think fit from time to time.

Bayley, J., said: "I have no doubt the deed was not a good execution of the power. The power is to sell the estate. The estate at the time when the sale took place consisted of land, timber, trees, fruit and other trees and wood and underwood growing upon it. The trustees were to sell it in the condition in which it was at that time." There is no real difference between the principle of the two cases. If instead of using the word "timber," we insert and read "minerals," we shall see that the whole matter will become as plain as possible.

The report goes on thus: "As the timber trees (that is "as the minerals") were part and parcel of the estate at that period of time, the trustees were not at liberty to divide one part from the other. It is said that the tenant for life might, if he had thought fit, have severed the trees and the underwood from the land, and he would thereby have acquired a distinct interest in himself. As to that it is sufficient to say, that the tenant for life has not made for himself such a distinct interest, and if he has not made for himself a distinct interest, but suffered the timber trees and the wood to continue parcel of the estate at the time when the power was executed, the whole of the purchase money of that estate, consisting of the land, trees and underwood, must go to the person in whom the estate was vested."

Littledale, J., said: "The power is given to the trustees to sell and dispose of the estate with everything on it, as it stood at the time. They had no power to make a distinction between the land and the timber growing upon it; it was not a good execution of the power, therefore, for them to sell the land, and then for the tenant for life to sell the timber."

Parke, J., said: "It appears to me to be clear, looking at the terms of the power, that the trustees were not authorized to sell the estate without the timber; they must sell both together. In this case, they have sold the estate without the timber; that, therefore, is not a sale as is authorized by the

power, and the revocation having been executed for the purpose of making a sale not warranted by the power is void." They all concur in that view of the case.

It is clear also, that the opinion in equity was the same, for Lord Eldon refused to restrain the persons who had obtained judgment at law from recovering the fruits of that judgment. Sir John Leach was of opinion that it was not such a defect in the execution of a power, though for valuable consideration, as this court would interfere to rectify; and the House of Lords were of the same opinion.

It is therefore clear, that in the most solemn manner, both at law and in equity, when this question has come to be decided, it has been held that the two subject-matters in dispute can not be sold separately, and that it is a bad execution of the power to sell the land and not to sell all that is properly and necessarily connected with it, in the ordinary meaning of the term. I see no distinction between minerals and timber; in principle they are the same. I must, therefore, answer this case by saying that the vendors can not, within the terms of the power, sell the surface of the land apart from the minerals.

ARMSTRONG v. CALDWELL.

(53 Pennsylvania State, 284. Supreme Court, 1866.)

Grant of right to dig coal. A conveyance of "the full right, title and privilege of digging and taking away coal to any extent (the grantee) may think proper * * * under the land of the" grantor, effects a severance of the right to the surface from the right to the underlying coal, and makes them distinct corporeal hereditaments.

[1] **No presumption of possession after severance.** The presumption that the party having the possession of the surface has the possession of the subsoil also, does not exist when these rights are severed.

[2] **Non-user.** In such case the owner of the minerals does not lose his right or his possession by any length of non-user. He must be disseized to lose his right, and there can be no disseizin by act that does not take the minerals out of his possession.

The Statute of Limitations is applicable to all corporeal hereditaments, including those that are only subsurface rights.

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[1] *Rowe* v. *Grenfel*, 13 M. R. 234.

[2] *Arnold* v. *Stevens*, 1 M. R. 176; *McBee* v. *Loftis*, 3 M. R. 222.

The adverse possession of the mine by the owners of the surface, for the statutory period would give title; but it must be distinct from the possession of the surface. It is unaided by surface rights or occupancy.

The possession to give title must be actual (as distinguished from constructive), exclusive, continued, peaceable and hostile.

Adverse possession by mining. If the owner of a mine is not in actual possession, and any person digs pits or drives adits, and carries on mining operations continuously for twenty-one years adversely to the right of any other, he may acquire a right; in such case he takes possession of the entire body of minerals in the land.

[1] **Court to determine what possession gives title—Use of coal by family.** The court below left it to the jury to find that the plaintiff had acquired title to the coal, by having taken it out for family and neighborhood uses at intervals for twenty-one years, without evidence that the taking had been constant and continuous. *Held*, error.

[2] **Possession a question of law.** It is for the court to say what kind of possession is necessary to give title by statute.

Burden of proof on the adverse occupant. The first entry of the grantee to mine having been made more than twenty-one years after the grant, the court instructed the jury that the statute was *prima facie* a bar. *Held*, to be error, the presumption being that the possession accompanied the title; the burden was on the plaintiff to show that he had taken and maintained adverse possession.

Error to the Court of Common Pleas of Westmoreland County.

Trespass, commenced August 12, 1863, by William S. Caldwell against Charles Armstrong, for breaking and entering the close of the plaintiff and carrying away 20,000 bushels of coal.

James Caldwell was the owner of a farm (the *locus in quo*), and on the 27th of May, 1831, conveyed two pieces of land, part of it to George Greer, and "also, the full right, title and privilege of digging and taking away stone-coal to any extent, he, the said George Greer, may think proper to do or cause to be done under any of the other land now owned and occupied by the said Caldwell, provided, nevertheless, the entrance thereto and the discharge therefrom be on the said described premises." James Caldwell died in 1847, having devised the farm to his son, William S. Caldwell, the plaintiff. Through various conveyances, the title of Greer vested in Armstrong, the defendant, on the 14th of April, 1864.

In *Caldwell* v. *Fulton*, 7 Casey, 475, it was decided that the

[1] *Jackson* v. *Stoetzel*, 1 M. R. 228.

[2] *Thistle* v. *Frostburg Co.*, 10 Md. 129.

above stated grant conveyed to Greer the absolute ownership of all the coal under Caldwell's land; and in *Caldwell* v. *Copeland*, 1 Wright, 427, it was decided that adverse possession by Caldwell of the surface for twenty-one years did not bar the right of the owners of the subsoil. In this suit Caldwell claimed to recover under the Statute of Limitations, upon the allegation that he had held possession of the coal for twenty-one years.

There was evidence that Caldwell, the father, during his life took out coal from under his land for his own use, and also for sale to his neighbors; that Greer was in sight of his mining and had not been known to challenge Caldwell's right, and had never taken any coal from Caldwell's land; that the plaintiff worked the mines in the same way until within two or three years of the trial. There was evidence also that one Fulton, under a lease from one of the intermediate owners of Greer's right, made an entry in the fall of 1852 for the purpose of taking out coal.

The court (Buffington, P. J.), amongst other things, charged as follows:

"What constitutes a continuous possession may depend upon the purposes for which it was used and the beginning of the periods of actual user. In the case of mines used for supplying a distant market with large or considerable quantities, or of supplying a manufactory, as a furnace or rolling-mill, there can be no doubt but what such constant operations, coupled with claim, would be continuous as to the whole. [A mine that is used alone for family and neighborhood purposes, as this seems to have been, is much more doubtful. We must either say that the statute can not apply in such cases at all when the limited demand did not require constant and continuous operation, or adopt a less stringent rule, one with such instructions and definitions as we can give from analogies, and leave it to the intelligence of the jury to say whether there had been such a possession as to give title by the statute.]

["We are requested to say that the evidence in this case does not warrant the submission of this fact to the jury. We decline to do so for the reason we have stated, that the rule or standard by which to judge of such possession in case of mines has not become fixed or definite, and in the judgment of the court depends much upon the circumstances of each case.]

"The next question is, if the plaintiff's possession was sufficient to give title, has the defendant shown such an entry as takes away the protection of the statute? [The deed was in May, 1831, and in the fall or latter part of summer, 1852, William Fulton took undoubted possession by extending the entries and rooms over the line and into the Caldwell land. This was over twenty-one years, and *prima facie*, the statute was a bar."]

The jury found for the plaintiff, $81.90. The defendant having taken a writ of error, assigned for error the three portions of the charge included in brackets.

W. H. LOWRIE and J. C. HUNTER, for plaintiff in error.

H. P. LAIRD, for defendant in error.

The opinion of the court was delivered, January 7, 1867, by STRONG, J.

That under the deed from James Caldwell to George Greer, made the 27th day of May, 1831, the latter acquired the absolute ownership of all the coal under the surface of the grantor's land, is not now in controversy. Nor is it denied that Armstrong, the plaintiff in error, has succeeded to the rights of Greer under that conveyance. But the plaintiff below, who is the son and devisee of James Caldwell, contends that Armstrong's title has been lost, by an adverse possession of the coal, continued for a period of more than twenty-one years. This adverse possession, he claims, was taken by his father, and maintained by him and the plaintiff himself until an entry was made under the Greer title in the summer of 1852.

Notwithstanding his deed to Greer, James Caldwell remained the owner of the surface. His deed effected a severance of the right to the surface from the right to the underlying coal. It made them distinct corporeal hereditaments. It is, no doubt, the general presumption that a party who has possession of the surface of land has possession of the subsoil also, because, ordinarily, the right to the surface is not severed from the right to the strata below the surface. But this presumption does not exist when these rights are severed. Each then becomes a distinct possession. In such a case, the possession of the surface, following the right, is as distinct from

the possession of the minerals or subsoil strata, which have been severed in right, as is the possession of one tract of land from that of another not in contact with it. Hence it is settled that when, by a conveyance or reservation, a separation has been made of the ownership of the surface from that of the underground minerals, the owner of the former can acquire no title by the Statute of Limitations to the minerals, by his exclusive and continued enjoyment of the surface: *Caldwell* v. *Copeland*, 1 Wright, 427. Nor does the owner of the minerals lose his right or his possession by any length of non-user: *Seaman* v. *Vawdrey*, 16 Ves. 390; *Smith* v. *Lloyd*, 9 Ex. 562. He must be disseized to lose his right; and there can be no disseizin by act that does not actually take the minerals out of his possession. There seems to be no reason why the Statute of Limitations should not be held applicable to all corporeal hereditaments, including those that are only subsurface rights. The British statute of 3 & 4 Will. 4, c. 27, certainly is applicable to such rights, and it can hardly be said to be more comprehensive than ours. In *Caldwell* v. *Copeland* it was said that adverse possession of the mine, by the owners of the surface, for the statutory period, would avail as title. But such possession must be distinct from that of the surface. It is unaided by surface rights or surface occupancy. What, then, is adverse possession of the coal in a tract of land, in a case where the owner of the land has by deed severed the ownership of the coal from the ownership of the surface? Its nature can not be changed by the fact that it is more difficult of enjoyment. Like adverse possession of every other corporeal hereditament, it must be actual (as distinguished from constructive), exclusive, continued, peaceable and hostile, for twenty-one years, in order to give title under the Statute of Limitations. There is no reason for adopting a less stringent rule. The owner of the surface can acquire title against the owner of the minerals underneath by no acts, or continuous series of acts, that would not give title to a stranger. If the owner of a coal mine is not in actual possession, and the owner of the surface, or any other person, digs pits or drives adits into the minerals and carries on mining operations there continuously for the statutory period, adversely to the right of any other, he may acquire a right. In such a case he takes actual possession of the entire body of minerals

in the tract of land: *Barnes* v. *Mawson*, 1 M. & Selw. 77. He may therefore acquire a title to the whole. But inasmuch as there can not be any residence upon the coal, or cultivation, without continual *pedis possessio*, or retention of the hold upon the mine, there can be no ouster, of the owner and consequently no acquisition of a right. If one digs turves, or cuts wood, upon another's land for his own family use, and if he even sells some of the turves he dug or the wood he cut to his neighbors, it is not pretended that he can acquire title to the land by such conduct, though repeated at intervals through the whole period of twenty-one years. Yet such acts are more notorious, and as much (if not more) a challenge of the owner's right than is taking coal from a coal deposit, by the owner of the surface, for his family use and for the use of his neighbors.

The court below, therefore, erred in leaving to the jury to find that the plaintiff had acquired title to the coal, by having taken out some of it for family and neighborhood uses at intervals during twenty-one years, without any evidence that the taking had been constant and continuous. The learned judge seems to have had the impression that a less stringent rule is to be applied to possession of an underground corporeal hereditament than the law demands when the question relates to possession of the surface. He therefore intimated that there might be such a relaxation of the rule, and left it to the jury to say whether there had been such a possession in this case as is requisite to give title by the statute. This was erroneous for two reasons. One has already been mentioned; and the other is, that it is for the court and not for the jury, to determine what kind of possession is necessary to give title by the statute. And we are unable to see any evidence of such adverse possession by the plaintiff, or by his father, as justified the submission to the jury of the question whether Armstrong had lost his right. The 1st and 2d assignments of error are therefore sustained.

And so is the 3d. It was a very palpable error to instruct the jury that the deed for the coal having been made in May, 1831, and the grantee having made his first entry on the vein in the summer of 1852, more than twenty-one years after his title accrued, the statute was *prima facie* a bar. The *prima*

facies was all the other way. Neglect of the grantee to enter, as we have seen, did not interfere with his right, or raise any presumptions against it. Having the title, the possession was presumptively in him, or those holding under him; and the burden was on the plaintiff to show that he, or his father under whom he claimed, had taken and maintained that adverse, continued, notorious and hostile possession which is essential to bar an owner's right.

The judgment is reversed, and a *venire de novo* awarded.

1. A severance of the mineral and surface titles is to be proved; it is not presumed: *Keyse* v. *Powell*, 2 El. & Bl. 132.

2. The maxim *sic utere tuo ut alienum non lædas* applied to upper and underground estates: *Jones* v. *Wagner*, 13 M. R. 690. See also *Williams* v. *Groucott*, 13 M. R. 362.

3. Adverse possession, after severance of the mineral and surface titles: *Arnold* v. *Stevens*, 1 M. R. 176; *Rich* v. *Johnson*, Id. 173; *Hodgkinson* v. *Fletcher*, Id. 173; *Caldwell* v. *Copeland*, Id. 189.

4. Jurisdiction of courts under the "Leases and sales of settled estates Act" to order a sale of mines apart from the surface: *In re Milward's Estate*, L. R. 6 Eq. 248.

5. Coal severed from freehold in constructing a lateral railroad: *held*, to belong to owner of fee: *Lyon* v. *Gormley*, 5 M. R. 383.

6. A sale of stones by the owner of a farm accompanied by removal of the same by the vendee to another part of the premises constitutes a severance and vests title in the purchaser: *Fulton* v. *Norton*, 64 Me. 410.

7. Right of entry on surface to get the minerals: *Marvin* v. *Brewster Co.*, 13 M. R. 40; *Grey* v. *Northumberland*, 7 M. R. 251; *Rowe* v. *Brenton*, 8 B. & C. 737.

ELLIS V. SCHMOECK ET AL.

(5 Bingham, 521. Common Pleas, 1829.)

Liability for company debts after transfer of scrip. The defendants had purchased the scrip of a mining company originated in fraud, and had attended the meetings of the company; but they never signed the partnership deed, were innocent of the fraud, and transferred their scrip before the plaintiff commenced an action for goods furnished to the company after defendants had purchased their scrip. *Held*, they were liable.

Action for goods sold and delivered. At the trial, before BEST, C. J., London sittings after Trinity term, 1827, it appeared that the goods were furnished for the Cornwall and Devonshire Mining Company. The defendants had received from the secretary of the company, certificates of their having paid a deposit upon the amount of their purchase money for certain shares in the company and had received papers called the scrip of the company, but they had not signed the partnership deed, and had transferred their scrip before the action was commenced.

Both defendants were present at a meeting of the company in August, 1825, but the defendant Thomas had not purchased his scrip until after a portion of the goods, for the price of which the action was brought, had been delivered. It was urged that as the defendants had parted with their scrip and had never signed the partnership deed, this action did not lie against them. However, a verdict was given for the plaintiff, and the jury found specially that the company originated in fraud, but that neither the plaintiff nor the defendants were parties to the fraud.

WILDE, Serjt., moved to set aside the verdict, and enter a nonsuit instead, on the grounds urged at the trial, or to reduce the damages to the amount of the goods furnished subsequently to Thomas' purchasing scrip. A rule *nisi* was granted and Taddy and Spankie, Serjts., showed cause.

WILDE and MEREWETHER, Serjts., *contra.*

As several cases of a similar kind were depending in the Court of King's Bench, the decision of the court here was postponed; and now none of those cases having proceeded to judgment, PARKE, J., said:

We have looked into this case, which was argued before my brothers, BURROUGH, GASELEE and myself, and are satisfied that the plaintiff must have his judgment. We had thought that a case which is depending in the Court of the King's Bench might have thrown light on the subject, but we are of opinion now that there is no case which immediately touches this. I shall not go into it at any length. We think the jury have, by their verdict, gone very far to conclude the question, because they find that the defendants form part of a company which was founded indeed in fraud, but they acquit both the defendants and the plaintiff of any cognizance of that fraud. The action was for goods sold and delivered to a very considerable amount, for furnishing the building in which the business of this company was to be carried on. We think that, under all the circumstances of this case, it approaches very nearly, if not quite, to the case of *Sir J. Perring* v. *Hone.* In that case Sir John Perring had entered his name in a book, with several others, for a projected joint-stock company; he received scrip receipts, but he sold them before the deed was executed for the formation of the company; and he never did execute that deed; but notwithstanding that, inasmuch as he had attended meetings and had received moneys and so forth, the court was of opinion, upon consideration, that he was still liable. The case of Viscount and Lady Anson,[1] we think, does not touch that, because, in the case of that lady, she had certainly received the scrip receipts and she had, perhaps, in loose conversations in her own family, talked of being a subscriber to the company, though it did not appear that she held herself out to the world in any respect as a partner; and, therefore, that case does not seem to us to apply to the present. In the present case the defendants attended all the meetings, and though they did not, in fact, sign the deed, that was no more than was urged in the case of Sir John Perring. Under all

[1] *Vice* v. *Anson*, 11 M. R. 244.

the circumstances of the case, we think the plaintiff is entitled to keep the verdict.

Judgment for the plaintiff for £234, the value of the goods furnished after the defendants were concerned with the company.

IN RE BAGLAN HALL COLLIERY COMPANY.

(L. R. 5 Ch. App. 346. Court of Appeals in Chancery, 1870.)

Shares of members owning the mine treated as paid up. Nine persons bought a moiety of a colliery from P. for £10,000, and the ten, after working it for some time, agreed to form a company for carrying it on, and a company was accordingly registered, the memorandum of association of which was subscribed by the owners of the colliery for numbers of shares proportioned to their respective interests, the nominal amount of shares subscribed for being £20,000. The memorandum stated nothing as to the shares being treated as paid-up shares, but the articles provided that all the shares subscribed for in the memorandum should be treated as fully paid up. The colliery was made over to the company, but no other payment was made by any of the subscribers of the memorandum. No other shares than those subscribed for by the memorandum were ever allotted: *Held* (reversing the decision of MALINS, V. C.) that the subscribers to the memorandum of association were not liable as contributories, for that the shares must be taken as having been fully paid up by handing over the colliery.

Paid-up shares. Review of the English decisions as to what shares are paid up.

Limitation of liability. It is the policy of the Companies Act to allow the adventurers to limit the extent of their personal liability.

Implied right to purchase. Where the stated object of a company is to work a colliery, the right to purchase it is implied.

The test to determine whether paid-up shares (so called) are in fact such, is: could the company have set aside the transaction by which it has so treated them?

This case came before the court on motion by way of appeal from a decision of Vice-Chancellor Malins, placing the names of the appellants on the list of contributories of the Baglan Hall Colliery Company, Limited.

In and for some time previous to the year 1867, ten persons were carrying on, in partnership, the business of a colliery,

known as "The Baglan Hall Collieries." J. G. Parker, who was one of them, had been the owner of the colliery, which he purchased in 1865, and the other nine persons had paid him £10,000 for a moiety of it, which sum they contributed in different proportions. After carrying on the business for some time without much success, they, in 1866, borrowed £3,000 and then £1,000 on mortgage of the colliery. Matters stood thus when the company was formed. It was deposed that at the time when the purchase was made, and subsequently when the above mortgages were made, the colliery was valued by surveyors as fully worth £20,000.

In May, 1867, the company was registered as a limited company. The memorandum of association stated the objects of the company to be "the working of the properties known as the Baglan Hall Collieries, in the county of Glamorgan, and any other colliery or collieries in the same county or conveniently adjacent," (then followed an enumeration of acts incidental to the carrying on of collieries) "and the doing all such other acts and things as may be in any manner incidental or conducive to the attainment of the above objects." The nominal capital was stated to be £25,000 divided into 500 shares of £50 each. The memorandum as originally drawn stated that of these shares 300, numbered consecutively from 1 to 300, were called A shares, and that those numbered consecutively from 301 to 500 were called B shares, and that these 200 B shares were allotted to Parker on the terms mentioned in the articles; but the whole of this statement was struck out in the memorandum as registered. The ten partners subscribed the memorandum for 400 shares in all, Parker for 200, and the others for numbers of shares corresponding to their interests in the concern. No other person subscribed the memorandum, and no other shares were ever taken. The original table of signatures to the memorandum described the 200 shares for which Parker signed as B shares, and the others as A shares; but this description was also struck out in the memorandum as registered. Parker was also originally entered as subscribing for 12 A shares, as well as the 200 B shares, but in the memorandum as altered he subscribed for 200 shares only.

The articles recited that the several persons whose names

were subscribed to the memorandum of association were possessed, in the respective proportions of the numbers of shares set opposite to their respective names, of the colliery, which was vested in Parker as a trustee for them, subject to the mortgages for £3,000 and £1,000, and that the same persons were desirous of framing regulations for the management of the said collieries. The articles then proceeded: "It is agreed that the provisions of Table A in the first schedule to the Companies Act, 1862, shall not apply to this company, but that the following shall be the articles of association of the company." The material part of the 2d clause was as follows:

"The nominal capital of the company shall be £25,000, divided into 500 shares of £50 each, but 400 only of such shares shall be allotted, until a resolution of the managing committee shall authorize the issue of the remainder thereof. * * * The said 500 shares shall be subdivided into two classes, and 300 of such shares shall be called A shares, and 200 of such shares shall be called B shares, and the said 200 B shares in addition to 12 A shares shall be allotted as fully paid-up shares to the said J. G. Parker, in respect of his interest in the said collieries and the property and effects thereof, upon the terms that the holder or holders of the B shares shall not be entitled to participate in the profits in any year in which the net profits shall be insufficient to pay a dividend at the rate of 20 per cent. on such of the 300 A shares as shall, for the time being, be subscribed for and allotted and fully paid up; but the whole of such profits, in case the same shall not in any year exceed 20 per cent. on the A shares so subscribed for, allotted and paid up, shall be divided amongst the holders of the A shares exclusively, and if such profits in any year shall be more than sufficient to pay a dividend of 20 per cent. on the A shares for the time being subscribed for, allotted, and paid up, but shall not be sufficient to pay a dividend of 20 per cent. on both the said A shares and the 200 B shares, then the surplus profits of such year over and above the 20 per cent. on the said A shares, shall be applicable to and applied in payment of a dividend on the said B shares *pro rata*. But if the profits in any year shall be sufficient to pay a dividend of 20 per cent. on both the said A and B shares, the whole of the A and B shares shall participate in the profits in such year *pari passu*."

19. "The whole of the 200 A shares subscribed for in the memorandum of association and the whole of the 200 B shares shall be deemed to be fully paid up, and every subscriber for the said 400 shares shall be credited in the books of the company with the full amount payable in respect of his shares; and every shareholder who may have advanced any moneys for the purposes of the collieries previously to the registration of the company shall be credited with the amount of his advances with interest after the rate of 5 per cent. per annum, from the date of each advance in the books of the company."

On 1st of June, 1867, Parker, in whom the legal estate in the colliery was vested, executed the declaration of trust in favor of the company.

Before the registration of the company, a negotiation had been going on with a Mr. Ashwell, for a loan of £7,000 on mortgage. This was continued after the registration, and the colliery was mortgaged to Ashwell for £7,000, Parker joining, and covenanting for payment, and the old mortgages being paid off out of the £7,000, thus leaving £3,000 applicable to working the colliery, which sum Parker, in his evidence, stated to have been misapplied.

The colliery was afterward sold by the mortgagee, under his power of sale, for £4,500.

An order having been made for continuing under the supervision of the court, a voluntary winding up of the company, the shareholders other than Parker resisted being placed on the list of contributories, and the question having been adjourned into court, Vice-Chancellor Malins decided that they must all be upon the list as holders of the numbers of shares for which they had subscribed the memorandum, treating such shares as shares on which nothing had been paid.

The shareholders, other than Parker, appealed.

Mr. COTTON, Q. C., and Mr. B. B. ROGERS, for some of the appellants, relied on *Drummond's Case*, Law Rep. 4 Ch. 772, and *Pell's Case*, L. Rep. 5 Ch. 11. They also referred to *Forbes and Judd's Case*, L. R. 5 Ch. 270; *Migotti's Case*, L. R. 4 Eq. 238; *Baron de Beville's Case*, L. R. 7 Eq. 11; *Leifchild's Case*, L. R. 1 Eq. 231; *Snell's Case*, L. R. 5 Ch. 22; *In re Anglesea Colliery Co.*, L. R. 2 Eq. 379; 1 Ch. 555.

Mr. EVERITT, for other appellants.

Mr. GLASSE, Q. C., and Mr. CALDECOTT, for the official liquidator:

Pell's Case turns on the ground that there was an unimpeached agreement for sale to the company, and on this all the decisions of that class rest. Here we say there was no agreement, for how are a body of persons to contract with themselves? The claim to freedom from liability rests on this, that the handing over of the colliery was a payment of £20,000; but, there being no effective contract, the sound view is that the colliery is to be taken only at its real value, according to the decision of the master of the rolls in *Pell's Case*. The formation of this company was a mere device for escaping the liability to pay just debts, and it comes within the observations of the lord chancellor in *Forbes and Judd's Case*, Law Rep., 5 Ch. 270. A company where all the partners take paid-up shares, and nothing else, is not within the spirit of the act. In *Leifchild's Case*, L. R., 1 Eq. 231, the point was not raised. If the register is not made up according to the requirements of section 25, creditors are entitled to treat the shares as not paid up. *Barge's Case*, L. R., 5 Eq. 420. Now here, no register could be correct but a mere copy of the memorandum.

Mr. COTTREL, for Parker, and Ashwell, the mortgagee, supported the decision of the vice chancellor, and referred to *Feiling and Rimington's Case*, L. R., 2 Ch. 714; *Sewell's Case*, L. R., 3 Ch. 131; *Droitwich Pt. Co.* v. *Curzon*, L. R., 3 Ex. 35.

Mr. COTTON, in reply.

Sir G. M. GIFFARD, L. J.

There appears to be some confusion in the views entertained of cases of this nature, and it will be well in the first place to consider what are the rules applicable to the subject. The only sections of the Companies Act that need be referred to are the 7th, 11th, 12th, 23d and 25th. The 7th provides

for the limitation of liability, the 11th provides for the memorandum of association, and the 23d provides that those who subscribe the memorandum are to be deemed to have become members of the company. Taking these sections together, a person who subscribes the memorandum of association is to be held to have agreed to be a shareholder for the number of shares in respect of which he subscribes it—to take them and to pay a proper consideration for them. The 12th section provides that the memorandum of association can only be altered in certain particulars and in a particular way; if, therefore, the memorandum and the articles are inconsistent the articles must give way; but there is not any inconsistency between a memorandum which is general in its terms, and articles which state that the payment for the shares is to be made in a particular way, according to the terms of a contract referred to in the articles; nor do I see that payment in kind according to a subsequent contract with the company is inconsistent with such a memorandum. If there be a contract of such a nature that on bill filed by the company it could not be set aside, a payment for shares in kind according to that contract is legal. The 25th section imposes on the company the duty of keeping a register of its members, showing to what extent the shares are paid up.

Several of the cases on the subject were reviewed by me in *Drummond's Case*, L. R., 4 Ch. 772, and may be rapidly run over. In *Evans' Case*, L. R., 2 Ch. 427, the decision simply was, that a man by signing a memorandum of association contracts to become a shareholder, and if he takes no shares he will be held liable in respect of that contract if there are shares in existence which can be attributable to him. There can be no mistake about what was decided in *Migotti's Case*, L. R., 4 Eq. 238, which is a case quite distinct from *Evans' Case*. It was decided that Migotti, by signing a memorandum of association, contracted with the company to take five shares, and that taking five paid-up shares which belonged to Carter, not to the company, was taking shares from Carter, and not from the company, and that therefore he had never fulfilled the contract with the company, which he had entered into by signing the memorandum of association. In *Baron de Beville's Case*, Law Rep., 7 Eq. 11, 14, the master of the rolls said: "A

person can not sign the memorandum of association for shares generally, and afterward say that some or all of them are paid-up shares, unless money or money's worth was actually paid by him or on his behalf for those particular shares; and also, if he sign the memorandum of association in respect of shares there stated to be paid-up shares, while they are not really paid up, he will, in my opinion, be liable to pay the amount due on the shares." That is, if a man contracts to take shares he must pay, either in money or money's worth, and payment in either will be a satisfaction. Then in *Pell's Case*, L. R., 8 Eq. 222, the master of the rolls allowed the agreement between Pell and the company that he should hand over property to the company, and that his shares should be taken as fully paid-up shares, to stand so far as the value of the property went, but directed an inquiry as to its value. This was varied on appeal, and the agreement not being impeached, it was held that the shares must be taken as fully paid up by the handing over the property. In *Forbes and Judd's Case*, L. R., 5 Ch. 270, the master of the rolls thought that *Migotti's Case* and *Drummond's Case* were in conflict, but the distinction between them appears to me to be broad and plain. He further suggested that if the arrangement by which the company incurred the obligation to purchase certain property from the shareholders, was antecedent to the formation of the company, the transaction was forbidden by the act, and the obligations of the shareholders could not be satisfied by it. When that case came before the Court of Appeal the lord chancellor was clearly of opinion that if the obligation on the part of the company was a valid and subsisting obligation when the shares were to be paid for, the time when it was contracted, was of no importance. That case may be taken as settling the law on the subject, and we only have to apply the law to the facts.

Here was a colliery in which, at first, Parker alone was interested. He sold a moiety to certain gentlemen for £10,000, which was paid. The colliery was then subject to two mortgages for £3,000 and £1,000. The owners went on working the colliery, not very successfully, and then determined to form a limited company, in order to avoid incurring further personal liability. It was the policy of the Companies

Act to enable this to be done, and with the soundness of that policy we have nothing to do. The memorandum of association was signed by Parker for 200 shares, and by all the other part owners for shares, the nominal amounts of which were equal to the sums they had respectively paid to Parker for their interests in the colliery. The memorandum states the object of the company to be the working this colliery and any other collieries in the same county, or conveniently adjacent, and the doing all such other acts as may be incidental or conducive to the attainment of any of the above objects. It was urged that purchasing the colliery was not one of the objects; but the company could not work the colliery without first acquiring some interest in it, and I think, therefore, that the purchase of it was an act "conducive" to the attainment of the primary object. Then, when we come to the articles, the distinction between A and B shares in the second clause occasions no difficulty, though nothing is said about them in the memorandum; it is merely provided that one class is to be postponed to the other in the division of profits. Then any person intending to deal with the company, and looking at the articles, would see, from the 19th article, that all the 400 shares subscribed for were fully paid-up shares, and would find from the register that the additional 100 shares were never issued; and he also would find from the articles that the allottees of the 400 shares must hand over the colliery to the company as the consideration for their shares. According to the decided cases, this, in the absence of fraud, was an effectual paying up of the shares in full. The test to be applied is this: Could the company by any proceeding have set aside the transaction by which it was arranged that the owners of the colliery were to have paid-up shares as the price of their interests in the colliery? and I say, on the evidence, that the company clearly could not. It was urged that the parties only agreed with themselves, and that therefore there was no contract. But every company is started by parties agreeing among themselves, and it is idle to say that they have nobody to agree with. There is nothing in the evidence to show that any person has been deceived. It appears probable that if the additional £3,000 which was raised by the last mortgage had been applied in working the colliery, the concern would have prospered.

The case is precisely the same as *Pell's Case*, L. R., 5 Ch. 11, and it must be held that the persons who subscribed the memorandum of association have paid all that they were bound to pay. Creditors have no ground for complaint, for persons who are about to enter into transactions of magnitude with an individual, make inquiry into the state of his circumstances; and so, if they enter into them with a limited company, it is their own fault if they do not inquire into the nature of the memorandum and articles, and look to the register of shareholders. In this case there was no concealment, and it would, in my judgment, be a total misapplication of the act, to say that a transaction like the present is not authorized by it. If strangers, no misrepresentation being made, choose to deal with a company without inquiry, they have no right to complain when it turns out that the shareholders are under no personal liability. Persons, however, who enter into a transaction of this nature must expect to have it strictly examined, and, under all the circumstances, the appellants must bear their own costs, both below and here.

FOREMAN, Assignee, v. BIGELOW.

(7 Central Law Journal, 430; 4 Clifford, 508. U. S. Circuit Court, Eastern District of Massachusetts, 1878.)

[1] **Fraud renders a contract voidable,** but does not make it void.

Pleadings strictly construed against the pleader. Pleadings which are uncertain or ambiguous must be taken in a sense most unfavorable to the pleader. Therefore, where a bill in equity, by the assignee of a bankrupt corporation, sought to charge shareholders in respect of their shares, and alleged that there were three classes of shares fraudulently issued, but did not specify to which class the defendants' shares belonged, they were entitled to assume that their shares were of the class least open to objection.

[2] **Fraudulent issue of shares as fully paid-up—Liability of shareholders.** Certain shares in a mining company were issued as fully paid-up shares, in exchange for mineral lands. The lands were worth far less than the nominal value of the shares, and the transaction was clearly fraudulent, but it was formal and regular upon its face; the

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[1] *Byard* v. *Holmes*, 6 M. R. 599.

[2] *Foster* v. *Seymour*, 23 Fed. 65; *Phelan* v. *Hazard*, 12 M. R. 52.

books of the company showed that the shares were fully paid for, and there was nothing to apprise an innocent purchaser that such was not the fact, and nothing to put him on inquiry. Some of these shares were innocently purchased by the defendants in open market. The company becoming bankrupt, its assignee filed a bill in equity against the defendants, setting out these facts, and praying for an account of the extent to which their shares of stock had been paid for, and the manner of payment. It was held that the bill must be dismissed. Innocent purchasers of shares are not liable in such a case, but the remedy of the corporation is against the guilty perpetrators of the fraud in their individual capacity.

Shares paid for in land at an over-valuation, in the hands of an innocent buyer for value, are paid-up shares.

Holders of shares issued improperly (as for mines at an over-valuation) are to be distinguished from the holders of shares which the corporation had *no power to issue.*

The capital stock of a corporation is a trust fund for the payment of its debts.

Statute of Limitations—Liability of stockholders. The limitation of two years in the Bankrupt Act, within which time the assignee must bring suit against any person "claiming an adverse interest touching any property or rights of property transferable to, or vested in, such assignee," applies to a suit in equity brought by the assignee of a bankrupt corporation to charge its shareholders on account of money due for the payment of their shares of stock, and the statute begins to run from the date of the assignment, and not from the date when the bankrupt court makes the assessment.

The opinion states the facts.

DRYDEN & DRYDEN and MCCOMAS & MCKEIGHAN, for the complainant.

SIDNEY BARTLETT, for defendants.

Mr. Justice CLIFFORD.

Fraud does not render a contract void, but voidable only at the option of the party defrauded, both at law and in equity, whether the fraud was committed by one of the contracting parties upon the other, or by both upon persons not parties to the transaction, the rule being that where the fraud was committed by one of the parties upon the other, the contract remains operative and in force until it is disaffirmed by the injured party. Chitty on Cont. (10th Ed.), 626; Addison on Cont. (7th Ed.), 228; *Clough* v. *Railway*, L. R., 7 Ex. 34;

Jones v. *Carter*, 15 M. & W. 724; *Upton* v. *Englehart*, 3 Dill. 496.

Sufficient appears to show that the complainant is the assignee in bankruptcy of the Central Coal Mining Company, and that the respondents are the owners of certain shares in the capital stock of that company. Attempt is made by the bill of complaint to compel the respondents holding such shares to pay certain sums alleged to be due for the non-payment in full of the amount of the capital of the company represented by such shares. From the bill of complaint, it also appears that the corporation was organized with a capital of $400,000, divided into shares of $100 each, and that certain persons named, five in number, none of whom are made respondents in the case, became the corporators and directors of the company, and that the whole amount of the original stock was issued to those five persons, of which $353,790 in amount was issued in consideration of the conveyance to the corporation by the directors of certain coal lands, fraudulently valued at that sum as between themselves, though in fact the lands were worth only twenty or thirty per cent. of that amount, and that the remaining $46,210 of the stock was issued to the directors without consideration. Corporate authority was subsequently given to the directors to issue the bonds of the company, secured by mortgage, in the sum of $100,000, and to increase the capital stock in that amount. New stock for $100,000 was accordingly issued and given, under a vote of the company, to such persons as purchased said bonds at ninety per cent. without other consideration. The directors pursuant to that vote did increase the capital stock of the company $100,000, and did issue certificates of shares for the same and gave them away without consideration. Shares of the capital stock of the company in due form were held by the respondents in the amount specified in the bill of complaint. Debts to a large amount were con tracted by the corporation, and on the 4th of May, 1874, the corporation was adjudged bankrupt. Nor is it questioned that the complainant is the lawful assignee of the bankrupt's estate, having duly succeeded the person who was first appointed to that place. As such assignee he, on the 26th of April, 1877, petitioned the proper bankrupt court for a call and assessment upon the capital stock of the company to pay

the debts of the corporation. Hearing was had and the court decreed that $200,000 of the original stock remained unpaid, that nothing had been paid on the increased capital stock and that the amount required to be raised was $281,120. Pursuant to that finding the court ordered a call and assessment on the whole capital stock, original and increased, of one hundred per cent., less any sum or sums that might have been paid thereon. Due and proper notice was given of that adjudication at the time it was made. What the bill of complaint prays, is for an account of the stock of each of the three issues held by each respondent, how and in what manner and to what extent the same has been paid for, and that the respondents be decreed to pay the par value of the same severally held by them, less any amounts they may have paid for the same.

Respondents demur and set up two grounds of defense: 1, the Statute of Limitations; 2, that they are not liable to the assessment set up in the bill of complaint. Due consideration will be given to both defenses, but it will be more convenient to examine the one addressed to the merits, before considering the question whether the claim is barred by the Statute of Limitations.

Considered broadly, the bill of complaint seeks to enforce from the respondents the payment of the entire capital stock of the company, or such portion of the same as may be necessary to pay the debts of the corporation, less the amount any particular holder of the stock may have paid toward his shares.

Three classes of shares were issued, as plainly appears from the allegations of the bill of complaint. 1. Shares to the amount of $350,790, fraudulently issued to the directors in payment for the mining lands which they, at a greatly over-valued estimation, conveyed to the corporation. 2. Unpaid shares to the amount of $46,210, issued to the directors without any consideration. 3. Shares to the amount of $100,000, issued by the corporation to such persons as took an equal amount of the mortgage bonds of the corporation at ninety per cent.

Viewed in the light of these suggestions, it is plain that it is sufficient for the respondents to show that the complainant can not sustain any claim against them as holders of the first issue of the original stock, as the bill of complaint does not charge that the respondents are holders of any particular issue

of the stock, or either of the other issues. Such being the state of the pleading, it is open to the several respondents to assume that his stock, as charged, is wholly of the first class of the stock which was issued to the directors in payment for the mining lands, the rule being that pleadings which are uncertain or ambiguous, must be taken in the sense most adverse to the pleader. Story's Eq. Plead. (7th Ed.), Sec. 257; *Foss* v. *Harbottle*, 2 Hare, 503; *Simpson* v. *Fogo*, 1 Johns. & Hem. 23; Ayckbourn Ch. Prac., 113; *Parker* v. *Nickson*, 7 L. T. N. S. 461. Certificates of shares of that kind were issued to the amount of $350,790, and nothing being alleged to the contrary, the several respondents in this controversy may properly assume that they are charged with holding of shares in the capital stock, the certificates of which were of that issue which were entered upon the books of the company as shares paid up in full.

Issued as these shares were to the directors in payment for the mining lands, they were, as between the grantors of the land and the directors issuing the shares, fully paid up, as the shares paid for the land, and the land conveyed paid for the shares; and all this appears upon the books of the company. Transferees of the shares took the certificates with nothing on their face to show any unfairness, and with nothing appearing on the books of the company to put them upon inquiry. Suppose that is so, still the complainant contends that such payment was made in mineral lands at a fraudulent valuation not binding on the corporation. Admit that, and still the fact remains that the land was actually received by the company in full payment for the stock, and that the shares were issued and delivered as fully paid-up shares. Taken as a whole, the averments of the bill of complaint show that the transaction in purchasing the mineral land and in issuing the first class of stock in payment for the same was a gross fraud upon the company which can not be sustained; but it does not follow that the present suit against the respondents is the proper remedy to redress the injury, for the reason that the contract was duly executed by the execution of the deed of conveyance to the corporation, and by issue of fully paid-up shares to the corporation for the whole amount of the agreed consideration of the mineral land. Nothing can be plainer in legal decision

than that the title to the mineral land passed to the corporation, and that the title to the paid-up stock passed to the directors. Formally executed as the contract was, it must stand until it shall be rescinded, or the assignee, if he prefers that course, may retain what the company received for the stock and seek redress in damages against those who defrauded the corporation. And the redress is at his command, but he certainly can not be allowed to disaffirm the contract only in part and affirm it as to the residue, as he must do in order to maintain the present suit against the respondents.

Beyond all question the present respondents are *bona fide* purchasers and holders of shares in the capital stock of the company, which the books of the company show were fully paid for by the directors, and which, by the terms of the contract between the directors and the grantors of the mineral land, were fully paid in the manner stipulated by the contract. Under such circumstances it can not be that the complainant, without disaffirming the contract, can be allowed to set up the theory that the property taken in payment of the shares was less than their estimated value, and to seek redress for the difference against *bona fide* purchasers of the same in the open market. Gross fraud may have been perpetrated between the parties to the sale and purchase of the mineral land, but it is nevertheless true, so far as the shares of the capital stock are involved, that the shares, as between the corporation and innocent purchasers of the stock in open market, without notice, knowledge or means of knowledge of the fraud, were paid up, as shown by the books of the corporation. Notice of the fraud, as respects the respondents, is not alleged, nor is there an intimation in the bill of complaint that any facts or circumstances were known to the respondents to put them upon inquiry in respect to any such imputation. Innocent purchasers of the stock in the open market are not liable in such a case, but the remedy of the corporation is against the guilty perpetrators of the fraud in their individual capacity. Support to the opposite theory is attempted to be derived from the adjudication of the bankrupt court, but the decree of the bankrupt court only adjudicates that for the purpose of paying off the indebtedness of the company a call and assessment be made on the stock of one hundred per cent., less any sum or sums that may have been paid thereon.

Properly considered as a whole, the decree of the bankrupt court does not absolutely fix and determine the amount to be assessed. Instead of that it merely calls for one hundred per cent., less all payments. Nor does the decree in any respect contradict the theory that the class of stock first issued was fully paid up before it was put upon the market; and, if so, the court is of the opinion that the proper remedy of the complainant is against the perpetrators of the alleged fraud, which he might have enforced the moment he was appointed assignee of the bankrupt's estate. Holders of shares issued improperly, stand on a different footing from the holders of shares which the company had no power to issue, as the purchaser in the latter case acquires nothing, and can not in general be held as a contributory: 2 Lindley on Part. (3d Ed.) 1381; *Bank* v. *Alison*, L. R., 6 C. P. 54; S. C., Id. 222. But the mere fact that a person has become a shareholder pursuant to a scheme which is *ultra vires*, will not relieve him from liability as a contributory, if the shares he has taken can be considered as legally existing, and he was, himself, a party to the scheme, or had knowledge of the fraud. Even where the shares were fraudulently issued, it is necessary to give strict attention to the precise facts, in order to ascertain what are the rights of the parties in the case.

The respondents were not subscribers to the stock, but the purchasers of the shares in the open market as paid-up shares. It was held in *Carling's case* that where the contract was to take paid-up shares the court could not convert the contract into one for unpaid shares, for reasons which are obviously sound and correct: *Carling's Case*, L. R., 1 Ch. Div. 124. Where there is a contract, even if fraud be imputed, the party seeking redress must disaffirm the contract, or proceed for damages against the perpetrators of the fraud. Such a party must throw over the agreement altogether, or he must take it as a whole. He can not adopt as to one part and reject it as to the rest: *De Ruvigne's Case*, L. R., 5 Ch. Div. 323. Certain shares of capital stock were allotted as fully paid-up shares, and the court held that as the shares had been allotted to a stranger as paid-up shares they could not be considered otherwise, and that neither he nor his alienees could be liable to contribute in respect of the shares: *Ex parte Currie*, 7 L. T. N. S. 486.

Argument to show that the transaction of issuing the stock in payment for the mineral land would have been valid if unmixed with fraud, is scarcely necessary, as the proposition is one which finds support in the daily transactions of life. *Spargo's Case*, L. R., 8 Ch. App. 413. Shareholders are not required to suspect fraud, or to institute inquiries where all seems fair and conformable to the requirement of law and fair dealing: *Waterhouse* v. *Jamieson*, L. R., 2 Sc. App. 29. Where certificates of shares were issued as fully paid up, when in fact no payment had been made, it was held in the Chancery Court of Appeal, reversing the vice-chancellor, that by the issue of the certificates the company were estopped from alleging that they were not paid up, and that an innocent holder of the shares could not be placed on the list of contributories in respect to such shares as unpaid shares: *Nichols' Case*, 26 W. R. 334. Three of the judges gave opinions:

THE MASTER OF THE ROLLS: "Where you have a receipt given you by the company, a final receipt, as a certificate of payment, what more is a *bona fide* purchaser to ask for, and what occasion has he to make inquiry? He has the representation of the company by the certificate that the shares are fully paid up. It appears to me the company, having made that representation by the certificate, to be used by the vendor as evidence of title, is estopped from saying afterward that the company has not received the money. * * * It appears to me impossible that the company should be allowed to say the shares were not paid up in due course." JAMES, L. J.: "Every person connected with the company who issues a certificate for paid-up shares in money, when the money or value has not been paid, is guilty of a personal wrong toward the company, and may be made answerable for it in exactly the same way and to the same extent, as if the money had been taken out of the coffers of the company to pay up the shares, or, as if, by some fraud of the directors and officers, receipts had been given for the payment when payment had not been made. If any person is a party to such a breach he can be made answerable for it, but that can not affect the position of one who says, you made a representation to me, and you are bound by every principle of law and equity to make good the representation upon the faith of which I was induced to act." THESIGER, L. J., held that any

such shareholder may show either that the shares have been paid up in fact, or that the company whom the liquidator represents have, by their words or conduct, estopped themselves from disputing that the shares have been so in fact paid up. Certificates of shares in due form were issued as paid-up shares, and there is much reason to hold that the corporation, as to innocent holders of the same, is estopped to set up the defense that they are void. They admit that the shares were paid up to the extent of fifty per cent., and the opinion of the bankrupt court contains a finding of the same import, which strengthens the position that the corporation is estopped to set up the defense that the certificates are void: *Riche* v. *Railway*, L. R., 9 Ex. 264. Power to issue shares was possessed by the company, and hence the rule that the holder takes nothing where the power is entirely wanting does not apply: *Ferguson* v. *Landram*, 5 Bush, 236; *Stace's Case*, L. R., 4 Ch. App. 688. Cases arise, however, where the suit was against the perpetrators of the fraud, or against holders of the stock, with notice that it was fraudulently issued, or with knowledge of such facts and circumstances as legally put them upon inquiry, in which the rule is different. Equity in such a case regards the property of the corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue it in whosesoever possession it may be transferred, unless it has passed into the hands of a *bona fide* purchaser; and the rule is well settled that stockholders are not entitled to any share of the capital stock or to any dividend of the profits until all the debts of the corporation are paid: *Railroad* v. *Howard*, 7 Wall. 409. Assignees in bankruptcy in such a case represent creditors as well as the bankrupt, and may disaffirm the contract or retain what passed to the bankrupt, and proceed for damages against the perpetrators of the fraud or against subsequent transferees of the stock, with notice that it was fraudulently issued, or with knowledge of such facts and circumstances as legally put them upon inquiry. Decided cases which assert that rule are quite numerous and decisive. Two or three cases of the kind deserve consideration, of which the following is perhaps the most important. Money was owed to the corporation for a subscription to the capital stock, and the debtor and the officers of the company entered into an agreement to extinguish

the stock debt, and to convert it into a debt for the loan of money. Bankruptcy of the corporation ensued, and the assignee claimed that the stock debt was due. Mr. Justice Miller gave the opinion, and in replying to the argument that the assignee can assert no greater right than the bankrupt, said: "The assignee is the representative of creditors as well as of the bankrupt. He is appointed by the creditors. The statute is full of authority to him to sue for and recover property, rights and credits, where the bankrupt could not have sustained the action, and to set aside as void transactions by which the bankrupt would be bound. * * * Though it be a doctrine of modern date, we think it now well established that the capital stock of a corporation is a trust fund for the benefit of the general creditors of the corporation." *Sawyer* v. *Hoag*, 17 Wall. 619. To the same effect also is the case of *Upton* v. *Tribilcock*, where the opinion was given by Mr. Justice Hunt. He decided that the original holder of stock in a corporation is liable for unpaid installments of stock without an express promise to pay the amount, and that a contract between such a subscriber and the corporation, or its agents, limiting the liability therefor, is void, both as to the creditors of the company and its assignee in bankruptcy; that representations by the agent of a corporation as to the non-assessability of its stock beyond a certain percentage of its value, constitute no defense to the action against the holder of the stock to enforce payment of the entire amount subscribed, where the holder has failed to use due diligence to ascertain the truth or falsity of such representations: 1 Otto, 45; 2 Cent. L. J. 784. Due care and diligence was not exercised by the purchaser in that case, though the proof was full to the point that he was legally put upon inquiry: *Thomas* v. *Bartow*, 48 N. Y. 193.

Half a century before these cases were decided, Judge Story held that the capital stock of a corporation was a trust fund for the payment of the debts of the corporation, and that it might be followed into the hands of the stockholders, or of any persons having notice of the trust attached to it: *Wood* v. *Dummer*, 3 Mason, 312. Trusts are enforced not only against those persons who are rightfully possessed of the trust property, as trustees, but also against all persons who come into possession of the property bound by the trust, and with

notice of the same; and whoever comes so into possession is considered as bound, with respect to that special property, to the execution of the trust: *Taylor* v. *Plumer*, 3 Maule & Selw. 574; *Adair* v. *Shaw*, 1 Sch. & Lef. 262. Reported cases almost without number lay down the same rule, but those referred to will be sufficient to illustrate the principle.

Nothing is alleged in the bill of complaint tending to show that the respondents were participants in the fraud, or that they had notice of the transaction, or knowledge of any facts or circumstances tending to put them upon inquiry; and if there were any such matters alleged in the bill of complaint it could not benefit the complainant, as it is settled law that in such a case the cause of action arose in favor of the complainant when the estate of the bankrupt corporation vested in him as the assignee in bankruptcy.

Where the charter of a bank contained a provision binding the individual property of its stockholders for the ultimate redemption of its bills, in proportion to the number of shares held by the stockholders respectively, the Supreme Court held that the liability of the stockholder arose when the bank refused or ceased to redeem and became notoriously insolvent: *Terry* v. *Tubman*, 2 Otto, 156. Just the same question, with others, was presented to the Supreme Court in a subsequent case, in which the court held, the chief justice giving the opinion, that the liability of the stockholders upon their unpaid subscriptions is that of debtors to the bank, and that all such balances pass to the assignee under the assignment, which, by the bankrupt act, is "of all the property, estate, credits and assets of the bankrupt, whether a corporation or an individual," and, for all that is shown in the record, the stockholders were liable to suit at any time for the recovery of the balance due from them, as such stockholders: *Terry* v. *Anderson*, 5 Otto, 632; *Kennedy* v. *Gibson*, 8 Wall. 505; *Com* v. *Bank*, 3 Allen, 42; *Baker* v. *Bank*, 9 Met. 182. Apply that rule to the case before the court, and it follows that even if the bill of complaint had charged that the respondents had notice of the fraud, or were put upon inquiry in that regard, it would not have benefited the complainant, as in that event his claim would have been barred by the two years limitation of the bankrupt act: *Bailey* v. *Glover*, 21 Wall. 342. Purchasers of stock, where it appears upon its face that it was

only partially paid up, may be held liable to pay up the unpaid installment, but the authorities to that effect have no application in this case. *Webster* v. *Upton*, 1 Otto, 65; *Upton* v. *Hansbrough*, 3 Biss. 427.

Adjudged cases in which it has been held that creditors or assignees in bankruptcy may enforce such payments, when the corporation would be estopped to do so, are suits against original subscribers or transferees, implicated in some way in the fraudulent transaction: *Upton* v. *Tribilcock*, 1 Otto, 45. Failure to use due diligence when put upon inquiry was the ground of the decision in that case: *Oakes* v. *Turquand*, L. R., 2 H. L. 325. Whatever remedy for the fraud the assignee had, it is evident he might have pursued at any time after he acquired title to the bankrupt's estate: *Ex parte Currie*, 7 L. T. (N. S.) 486; *Carling's Case*, L. R., 1 Ch. Div. 124; *Alison's Case*, L. R., 9 Ch. App. 6; *De Ruvigne's Case*, L. R., 5 Ch. Div. 323.

Demurrer sustained. Bill of complaint dismissed.

1. "Share" and "Certificate" distinguished: *Payne* v. *Elliot*, 54 Cal 339; *Post* TROVER. A share is not an interest in land: *Powell* v. *Jessopp*, 18 Com. B. 335.

2. Relief of shareholders against fraudulent conduct of directors: *Blain* v. *Agar*, 6 M. R. 393.

3. Application for shares and allotment of the shares to the applicant, *held*, to constitute a complete contract: *In re Aberaman Iron Works*, L. R., 4 Ch. App. 532.

4. Directors exceeding their authority in the transfer of shares, *held*, not to release the holders of such shares from liability as contributors: *Bennett's Case*, 5 De G., M. & G. 284.

5. Shareholder having a right to have his name removed from the registry requested that his deposit might be returned, which was done, but his name remained on the registry; *held*, that he was not liable as a contributor: *In re Canadian Oil Co.*, L. R., 5 Eq. 118.

6. Forfeiture of shares upon non-payment of arrears optional with company: *In re East Kongsberg Co.*, L. R., 1 Eq. 309.

7. Facts amounting to an admission that a party was a shareholder and was bound for company debts: *Harrison* v. *Heathorn*, 6 Scott N. R. 735; *Johnson* v. *Goslett*, 18 Com. B. 726; 3 Com. B. N. S. 569.

8. Shares, whether to be transferred by parol or by writing, a question for the jury upon all the facts: *Watson* v. *Spratley*, 10 Exch. 222.

9. A shareholder repudiating his ownership can not at the same time maintain action for dividends: *Hughes* v. *Vermont Co.*, 72 N. Y. 207.

10. Where vendor sells shares in a company in which consent of directors is necessary to the transfer, he is bound to procure such consent; failing,

he is bound to repay purchase money, and this although the shares have meanwhile fallen: *Wilkinson* v. *Lloyd*, 7 Q. B. 27.

11. A shareholder may set off a claim against the company: *Garnet M. Co.* v. *Sutton*, 3 B. & S. 321.

12. The purchaser held not bound to register; nor to save his vendor harmless on calls made after the purchase: *Walker* v. *Bartlett*, 17 Com. B. 446. Qualified and liability enforced: *S. C.*, 18 Id. 845.

13. A subscriber is not entitled to his certificates till he has signed the deed of settlement: *Wilkinson* v. *Anglo Cal. M. Co.*, 18 Q. B. 728; and his shares may be forfeited for refusing to sign: *Stewart* v. *Anglo Cal. M. Co.*, Id. 736.

See STOCK.

WOLFLEY ET AL. v. LEBANON MINING CO., OF NEW YORK.

(4 Colorado, 112. Supreme Court, 1878.)

Right to follow dip. Section two of the act of Congress of July 26, 1866, clearly permits the patentee of a lode mining claim to follow the lode in its descending course to any *depth*, although in its downward trend it is carried by dips, angles and variations, into the adjoining land.

Relation between lode and surface ground. The surface ground and the lode are not independent grants. It is not the purpose of the act to grant surface ground without a discovered lode. The lode is the principal thing, and the surface ground incident thereto.

[1] **Lateral boundaries limit right of possession.** A lode claim is to be fixed by reference to the plat or survey of the location, and although the lode in its descending course may be followed to any depth into the premises adjoining, yet in its onward course or strike it may not depart from the line of its location, and the patentee is not entitled to its possession beyond the lateral boundaries, as against one who has subsequently located and patented it. If the patent is broader than the law, it is to that extent nugatory.

[2] **Effect of notice required by the statute.** The notice required by the statute to be given by the register of the land office, as well as by the claimant, is in effect a summons to all adverse claimants.

[3] **Patent construed by act of Congress—District rules, subordinate.** As long as local laws are not in conflict with the laws of the United States, they must be observed; but the act of Congress can not be subordinated to the local laws, and it is in the light of the provisions of the act of Congress that every patent issued in pursuance thereof must be construed.

Appeal from District Court of Clear Creek County.

At the trial in the court below the appellee relied on title derived by discovery, pre-emption and several mesne conveyances from the alleged pre-emptors, to Harris, the discoverer, and from him to Brown. Brown obtained a patent from the government and conveyed his interest to the appellee. The patent contains the following language: "it being the express intent and meaning of these presents, to convey to the said J. Warren Brown, his heirs and assigns, only the eight hundred (800) linear feet of the Ben Harding lode, with surface ground

[1] *Johnson* v. *Buell*, 9 M. R. 502; *Golden Fleece Co.* v. *Cable Co.*, 1 M. R. 120; *Lebanon M. Co.* v. *Rogers*, 8 Colo. 35.

[2] *Mont Blanc Co.* v. *Debour*, 61 Cal. 364.

[3] *Jupiter Co.* v. *Bodie Co.*, 4 M. R. 411.

hereinbefore described, *commencing at the center of discovery shaft on said lode and extending thence westerly eight hundred (800) linear feet, along the course of the vein*, the same being known as claims Nos. 1, etc., * * * "with the right to follow said Ben Harding lode or vein, to the distance of eight hundred (800) linear feet, with its dips, angles and variations, to any depth, although it may enter the land adjoining."

L. C. ROCKWELL and JAMES B. BELFORD, for appellants.

H. M. & W. TELLER, for appellee.

THATCHER, C. J.

This was an action of ejectment brought by appellee against appellants to recover the possession of eight hundred feet of the Ben Harding lode. The declaration contained three counts, in the first of which the appellee claimed title in fee, and in the second and third it claimed title by pre-emption, occupation, possession and purchase, under and by virtue of the local laws, customs and usages of miners in Griffith mining district, the laws of Colorado and those of the United States.

In support of the second and third counts, much evidence was introduced, which, however, the court charged the jury to disregard in the following instruction:

"After the issuing of the patent, all previously acquired rights by the patentee under the local laws, usages and customs of the particular district in which the claim is located, are merged in the patent, and the plaintiff having put in evidence a patent from the United States, you must not consider the right or title acquired prior to the issuing of the patent, such rights being merged in the patent."

Whether this instruction correctly lays down the law, we need not now decide. It could not prejudice the defendant. It is enough to say that by this instruction the jury was necessarily confined to the issue made upon the first count. By their verdict they found that the plaintiff was the owner in fee of the property described in the declaration. This verdict was responsive only to the first count.

The evidence tended to show that the Ben Harding lode

in its onward course or strike departed from the vertical side lines of the location as described in the patent and represented by the plat incorporated therein, and entered the Bell Tunnel lode location, which was patented under the act of Congress of May 10, A. D. 1872. That the plaintiff had the right to so follow the patented lode, was affirmed in the instructions of the court. Upon this theory the case was tried. To determine its correctness, reference must be had to the act of Congress of July 26, 1866, under which the Ben Harding lode was patented.

At common law a grant of land carries with it all that lies beneath the surface down to the center of the earth. At his pleasure the owner of the soil may apply to his own purposes whatever is included in the segment of the earth carved out by his descending exterior boundary lines.

Says Sir William Blackstone (Book 2, p. 18): "*Cujus est solum, ejus est usque ad coelum*, is the maxim of the law; upward, therefore, no man may erect any building, or the like, to overhang another's land; and downward, whatever is in a direct line between the surface of any land and the center of the earth, belongs to the owner of the surface; as is every day's experience in the mining countries."

By the rules of the common law, except so far as such rules have been modified by statute, must the extent of the plaintiff's patented grant be determined. That there may, however, be a grant of mineral separate from the grant of the circumjacent land, and *vice versa*, where the grantor manifestly intends that each shall form a distinct possession and different inheritance, admits of no doubt. The question recurs: What did Congress, by its declared will in the act of 1866, authorize the United States to grant? In the light of a just interpretation of this act, must the Ben Harding patent be construed. If the patent is broader than the law, it is to that extent ineffectual. Based upon the statute, its validity, and the extent to which it operates as a conveyance, must be determined by reference to the statute.

Section two provides that it shall be lawful for the claimant of a vein or lode "to file in the local land office a diagram of the same, so extended, laterally or otherwise, as to conform to the local laws, customs and rules of miners, and to enter such tract and receive a patent therefor, granting such mine

together with the right to follow such vein or lode, with its dips, angles and variations *to any depth*, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition."

This section clearly permits the patentee to follow the lode in its descending course to any depth, although in its downward trend it is carried by its dips, angles and variations into the adjoining land. Here is a departure from the common law doctrine. The qualifying words, however, "*to any depth*," limit the direction in which the mine may be pursued beyond the side lines. The claimant is required to file in the land office a diagram of his vein or lode. This is his own act. The law contemplates that before he prepares his diagram he shall so far expose and develop the lode as to be able to trace its course. The position, that if the plat made by the surveyor does not cover the lode the patentee should be permitted to so shift the lines of his patent as to include the lode which he before, through inadvertence or ignorance, failed to properly locate, is, it is conceived, without force. The error is not the mistake of a government officer, but the mistake of the claimant, and others ought not to be permitted to suffer by it. It is not the province of the surveyor to either discover or determine the course of the vein. He acts under the directions of the claimant of the mine, who has already furnished a diagram of his lode. His duties are to survey the located premises and make a plat thereof, indorsed with his approval, designating the number and description of the location, the value of the labor and improvements, *and the character of the vein exposed.* [See Sec. 3.] However tortuous might be the course of the lode, the claimant had a perfect right to follow it up and prepare his diagram so as to include it, together with the surface ground on each side thereof allowed by local laws. There is no language in the act that requires the diagram to be in the form of a parallelogram or in any other particular form.

From an examination of the entire act it seems to us that the central idea of a mining location under its provisions is, that there must be a discovered lode within it, whose *locus* in its onward course or strike, is embraced by its boundaries.

An assumed mining location, which in fact contains no mine, would be wholly false and would contravene the law. Until a

patent issues, to the extent only in its onward course, that a discovered lode is within the prescribed exterior boundaries of the claim, is the location itself unassailable: *Patterson* v. *Hitchcock*, 3 Colo. 533. The surface ground and the lode are not independent grants. It is not the purpose of the act to grant surface ground without a discovered lode. The lode is the principal thing and the surface ground incident thereto. In conveying a segment of the earth located under the provisions of the act it is the intention of Congress to convey a mine contained within that segment as the substance of the grant.

The act appeals to the industry and enterprise of the miner to make sure that the lode is within his location. The higher his diligence in this respect the greater will be his reward. If by lack of assiduity and energy he makes an untrue location—a location not embracing the lode he seeks to secure—he can not be heard to complain that others have explored and occupied the adjacent territory and discovered therein a lode which might have been embraced in his diagram. If, as the evidence tends to show, the Bell Tunnel lode is but a continuation of the Ben Harding lode (after its departure from the vertical side lines) extending through the adjacent location, upon what principle of justice or of law, in the absence of an express statutory provision, can the patentee of the lode last named claim the right to encroach upon the premises embraced by the Bell Tunnel lode location, and deprive the owner thereof of the fruits of his discovery?

Before a claimant is entitled to a patent under the act of 1866, a compliance with its provisions is indispensable. It is necessary that a diagram of the lode claimed shall be filed in the local land office. Notice of the extent of the claim must be given to the world by posting such diagram in a conspicuous place thereon, together with the declaration of the claimant's intention to apply for a patent. The register of the land office is required to give a like notice by publication in a newspaper, and by posting in his office for a period of ninety days, which is, in effect, a summons to all persons whose interests may be affected by the issuance of a patent in conformity with the diagram, to appear and file an adverse claim. If, after the expiration of ninety days, no one appears to contest, the surveyor general, upon application of the claimant, is re-

quired to survey the location and make an approved plat thereof, and designate the number and description of the lode, the value of the labor and improvements, and the character of the vein exposed. For what purpose must these several acts be done? Do they not point with certainty to a segregation from the public domain of a described tract embracing a lode? If they have any significance, we are constrained to the conclusion that one of their leading objects is to require that the claimant shall, before applying for a patent, ascertain the exact location of his lode, and fix that location by his diagram so that the public may be apprised of the limits of the lode location, and may thereafter with safety explore and occupy adjacent tracts.

It is apparent that within the meaning of the act the lode claimed is to be fixed by reference to the "plat and survey" of the location, and although in pursuance of its provisions the lode in its descending course may be followed *to any depth* with its dips, angles and variations into the premises adjoining, yet, in its onward course or strike, it may not depart from the line of its location.

It is, however, insisted that, if not by the literal terms of the act of July, 1866, then by virtue of territorial legislation and local customs and rules of miners, the patentee was entitled to follow the course of the discovered lode whether it was comprised within his location or not; that one of the purposes of the act of Congress was to recognize and confirm mining rights and titles as they existed under local laws and customs; that whatever may be the true construction of the act as to locations made subsequent to its passage, as to locations made prior thereto, it authorized the issuance of a patent for a lode located in conformity with the rules and customs of the mining districts in which it was situated, even though it might depart in its linear course from the lateral boundaries of the described premises.

The act declares that the mineral lands of the public domain are free and open to exploration and occupation, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, *so far as the same may not be in conflict with the laws of the United States.* Before the passage of this act, with the view to protect the miner in the occupation of the

public domain, although he was technically a trespasser as against the United States, the courts held that as between him and a third person, he might be considered as being in possession with the assumed assent of the owner. But by that act the assent of the United States to the exploration, occupation and purchase of mineral lands of the public domain is expressly declared. Under its provisions, the miner, having located his claim, is to be treated as an express licensee of the United States, and, independent of a purchase from the government of his mining claim, he has, upon compliance with the terms of the act, a right to appropriate the minerals therein contained. A title in fee by patent is offered him, which he may at his pleasure accept or reject. By the statute his rights are circumscribed and determined. The act of Congress from which they spring is paramount to all local laws, rules and customs. The first section of the act, we think, leaves no room for doubt on this point. As long as they are not in conflict with the laws of the United States they are of binding force and must be observed. But the act of Congress can not be subordinated to the local laws, rules and customs. It is in the light of its provisions that every patent issued in pursuance thereof must be construed, and we can not therefore admit that any such patent can by virtue of local laws and customs transfer to the patentee any greater interest or estate than that which the paramount law warrants.

In the case of *Chapman* v. *Toy Long*, 4 Sawyer, 34, the court, commenting upon the rights of the miner upon the public domain since the passage of the act of 1866, and subsequent acts upon the same subject, says:

"But under the mining laws of the United States now in force, the locator of a mining claim, as to the right to the possession of the premises and to appropriate minerals therein, becomes and is the assignee (licensee) of the United States so long as the law remains in force and he complies with the conditions imposed by it. Until Congress withdraws this license by a repeal of the law, the right of the locator to the possession of his claim and to appropriate to his own use the mineral deposits therein, is full and complete, and he need not take any steps to purchase the land or obtain a patent for it. That is a matter left to his own option or sense of self-interest."

There is no time prescribed within which he shall apply for a patent. Ample opportunity to ascertain the precise *situs* of his lode with reference to the contiguous land is given him. The surface and the lode are both the subject of the grant. The patent operates to convey not only the circumscribed tract of land which, under the claimant's direction, has been platted, but also the lode contained therein, with the right to follow the same in its downward course into adjoining premises, but not to follow it when, in its onward course or strike, it departs from the vertical side lines. In the latter case, after its departure, it is the subject of location by whomsoever it may be discovered.

If, then, as the evidence tends to show, the ledge on which the Ben Harding lode was located, deflected in its onward course or strike from the patented side lines, the patentee is not entitled to its possession beyond his lateral boundaries, as against one who has subsequently located and patented it.

Judgment reversed, and cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

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[1] FREELAND V. HOFFMANN.

MOUNTAIN KING LODE V. LITTLE CHICAGO LODE.

(MS. U. S. Circuit Court, District of Colorado, 1880.)

[1] **Side veins.** Where a party owns a vein extending throughout his location, he may claim all other veins within the lines of such location.

The adverse claimant may recover the vein adversed, although a separate vein, if found within the lines of his older and better location, to the extent that it is so found within the lines of such location.

The burden of proof is upon the adverse claimant to establish his case by a preponderance of evidence.

Ejectment in support of an adverse claim filed on behalf of the Mountain King Lode against the application for patent on

[1] *Pardee* v. *Murray*, 4 Mont. 234; 15 M. R. —.

the Little Chicago Lode, both situate on Sheep Mountain, in The Consolidated Ten-mile Mining District, Summit County, Colorado.

JOS. W. TAYLOR, for plaintiff.

CHAS. H. WENZELL and R. S. MORRISON, for defendant.

At the close of the argument the jury were charged by HALLETT, D. J., as follows:

Gentlemen:—I think you understand the questions here presented without anything from me. The plaintiff claims that near the northeastern end of his claim, as I understand the location of it, his grantor discovered a vein which extends from thence throughout the entire length of it; that by reason of that fact he is entitled to the whole territory claimed by him. The position of the defendant is that no such discovery was made, no lode found in that shaft, and if anything was found there, that it was never shown to extend to the end of the claim in which the ground in controversy lies. (The tract in controversy, as you see by the maps, is not very large in itself—that is the extent to which the claims overlap each other.) Those are questions of fact that you are to determine from the evidence. The evidence is conflicting. It is your duty to weigh it as best you can, and determine the facts as you conceive them to be, according to the evidence. If the vein which the defendant claims is separate and distinct from the other—that is, if you find that there is a vein in plaintiff's discovery shaft, and that it is separate and distinct from that claimed by the defendant—you must also believe from the evidence that this vein which the plaintiff has extends throughout the claim. It is a rule of law that a party having a vein which extends throughout his location may claim all other veins within the same location. I think most of you understand that, so that, if it should appear to you that the plaintiff has in his ground and in his discovery shaft there a vein, and it also appears that it extends throughout the length of his Mountain King location, he may take the other vein, although it may be separate and distinct from that which he has located.

The evidence, some of it, at all events, may tend to prove

that if there is a vein extending throughout the plaintiff's claim, that it is a separate vein from the other, and in that view it would be a question whether a location on a vein which he claims to have in his discovery shaft extends down to the other end of the claim and into that part of it, because upon that would depend his right to take this ground which is in conflict between the two locations.

The burden of proof is upon the plaintiff, and these facts which are essential to maintain his cause must be established by a preponderance of testimony; that is, if it is equally balanced, the verdict would be for the defendant. If the evidence of the plaintiff outweighs that of the defendant, why, then the fact is to be determined for him.

1. Side lines can not be changed so as to interfere with subsequent locations: *Golden Fleece Co.* v. *Cable Co.*, 1 M. R. 120.

2. No vein can be followed beyond the side lines of the claim, except on the dip: *Id.; Johnson* v. *Buell*, 9 M. R. 502; *Flagstaff Co.* v. *Tarbet*, 9 M. R. 607; *McCormick* v. *Varnes*, 9 M. R. 506; *Iron S. Co.* v. *Cheeseman*, 9 M. R. 552; *Tombstone M. Co.* v. *Way Up M. Co.*, 1 Ariz. 426.

3. The principal vein leaving the side lines, the location (unpatented) beyond such point is void: *Patterson* v. *Hitchcock*, 5 M. R. 542.

4. Rulings as to end lines: *Eureka Co.* v. *Richmond Co.*, 9 M. R. 578; 634; *Flagstaff Co.* v. *Tarbet*, 9 M. R. 607.

BEAN ET AL. v. VALLE ET AL.

(2 Missouri, 126. Supreme Court, 1829.)

Use of depositions on appeal. Depositions filed but not preserved on the record, in a chancery cause, can not be used before the Supreme Court, on the trial of an appeal from the decree of the Circuit Court.

[1] **Statute of Frauds, how pleaded.** A plea of the Statute of Frauds should expressly aver that the contract concerning the land was not in writing, and should contain an answer to all the other facts not expressly denied by it.

Statute of Frauds Sale by transfer of receiver's receipt. Bean delivered his receiver's receipt for an eighty-acre tract, indorsed as below stated, to Keemle, telling him to sell the land to J. & V. Valle for one hundred dollars if he could get it. J. & V. Valle agreed to take the land, paid the sum stated, and Keemle delivered to them the receiver's receipt with the indorsement "transferred to Valle, Janis & Valle," signed "J. S. Bean." The purchase money was paid to Bean, who expressed himself well satisfied. The purchaser was put in possession, and in a short time developed valuable lead diggings: *Held*, that the contract was not within the Statute of Frauds, and specific performance was decreed.

[2] **Sudden appreciation of mineral land—Value no proof of fraud.** "Whoever is at all acquainted with the operations of mining, must know that a man may live on land for half a century, may dig into it often and deep, and discover nothing of value; another may thereafter, or he may himself thereafter, by one day's labor, discover a mine of great value." The fact of valuable lead diggings being opened on a tract purchased, within a short time after its purchase, is no evidence of a fraudulent concealment of its mineral value by the purchaser.

The discovery of a valuable mine between the time of contract and the time for delivery of deed, whereby the land is shown to be worth a great price, instead of the small price paid for it, does not affect the transaction so as to make a court of equity treat it as an inadequate price and on that ground refuse specific performance.

In chancery; appeal from the Circuit Court of Jefferson County.

M'GIRK, C. J., delivered the opinion of the court.

Valle, Janis & Valle, brought their bill for a specific performance of a contract for the sale of a tract of land, against the defendants.

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[1] *Beard* v. *Converse*, 2 M. R. 670.

[2] *Falls* v. *Carpenter*, 6 M. R. 398; *Henry* v. *Everts*, 5 M. R. 603.

The court made a decree for the plaintiffs, Valle, Janis & Valle. Bean, Oden and Rector appealed to this court. The error assigned is a general one, which is, that the decree is erroneous; under this assignment, we will only look at the decree, the bill, answer and exhibits. Before I proceed with the case, I will advert to one point made by the appellants, which came up as matter of practice, which is, that it appears by the record that the cause was submitted to the circuit court on the bill, answers, etc., and also on depositions filed. Certain depositions are now produced, and the appellants' counsel insists on the right to use them before this court, as a part of the facts on which the decree is founded, or should have been founded; it is certified on these depositions that they were filed in the circuit court. It is objected that the depositions can not now be used, because they are not preserved on the record as directed by the 42d section of the act to regulate proceedings in chancery (Digest, 645). I am clearly of opinion the appellees are right in their objection. The 42d section of the act says, "it shall be the duty of every court of chancery (from whose decree an appeal lies) to cause the facts on which they found their decree fully to appear upon the records, either from the pleadings and decree itself, or from a state of the case agreed by the parties or their counsel, or from an examination of witness reduced to writing by the commissioner, or by a special verdict found by a jury impaneled for that purpose."

By the 28th section of the same act the court is required to appoint a commissioner, whose duty it shall be, says the section, to take testimony in any cause when required thereunto by the court, and to report thereon, etc.

The 46th section of the same act says, "that in all appeals from a court of chancery, the Supreme Court shall examine the record, and take into consideration such facts only as appear by said record to be the facts upon which the sentence or decree appealed from was founded," etc.

These depositions appear to have been taken, not by the commissioner, but by a justice of the peace, and unless the facts appear upon the record by one of the four modes required by the 42d section, it is most clear to me they can not be taken any notice of on an appeal.

I will now proceed to the facts contained in the pleadings of the parties, and those contained in the decree. It appears that on the 3d of July, 1824, one of the defendants, J. L. Bean, obtained from the receiver of public money for the St. Louis land district, the following receipt, to-wit:

"RECEIVER'S OFFICE, St. Louis, 3d of July, 1824.

Received from Jonathan L. Bean, of St. Louis City, Mo., the sum of one hundred dollars, being in full for W. half S. W. quarter of section No. 4, township No. 38, N., range No. 5 E., containing eighty acres, at the rate of $1.25 per acre.

G. F. STROTHER, Receiver."

That immediately Bean, with others under his direction, entered on the land and dug for lead ore; that some lead was raised therefrom, but the prospect was not very good. That in the meantime Bean offered to sell the land to one Duncan for $100; that this operation continued till about the month of November in the same year, when Bean left the land and went to St. Louis, and appointed an agent to attend to the land. That before he went to St. Louis, he proposed to sell the land to the complainants, and that no agreement was then made; that mining was still carried on under the agent without much success. That some time in the month of November, in the same year, Bean wrote and delivered to one Keemle the following letter:

'Mr. A. JANIS—*Sir:* Since my arrival at this place, several applications have been made to me for the half quarter section of land adjoining your furnace, but owing to my having made a previous arrangement with you, I felt myself in honor bound to give you the preference. Mr. Keemle, who is on a visit to your mines, will therefore make the arrangement with you the same as if I were present. Esteem, yours, etc.

J. L. BEAN.

If Mr. Janis is not present, Mr. Valle will please read the above. BEAN."

Which letter was written at St. Louis, and addressed on the outside to Valle, Janis & Valle, and together with the receipt of the receiver above mentioned, delivered to one Charles Keemle, for the purpose of enabling him to dispose of the land to complainants, who then were, and for some time before

had been, doing business under the name, firm and style of Valle, Janis & Valle. That at the time Bean delivered the letter and receipt to Keemle, he gave to him verbal directions to dispose of the land, and get therefor, if he could, $125, and if not, then to take $100; he also gave to Keemle at the same time, a letter to Garraty, his agent, the contents of which were not proved.

That a few days thereafter Keemle gave the letter to Janis, one of the complainants, and proposed to sell the land to him for $125, which Janis refused to give, stating that the land was of no value to him but for the wood on it, and of its contiguity to his own land, and that because the diggers on it were troublesome to him, he would buy it, and that he would not give more for it than the original price.

That Keemle endeavored to get more for the land, but being unable to do so, agreed to take $100, and delivered to said Janis the receipt of the receiver, with the following indorsement thereon: "Transferred to Valle, Janis & Valle," and signed "J. L. Bean," which signature was admitted and proved to be in the handwriting of Bean, and the body of the transfer was alleged by the bill, and not denied by the answer, to be in the handwriting of Bean.

It was expressly admitted by the respondents' counsel to be so, by an admission signed by them of record.

It was also proved that Bean was fully paid the $100 for the land, and that Bean, when informed of the sale by Keemle, expressed himself well satisfied. It appears also that Bean afterward sold the land to Oden, for what consideration does not appear, and that Oden soon thereafter sold one half thereof to Rector, for what consideration does not appear; and that both Oden and Rector, when they bought, knew of the sale to the complainants; and it also appears that immediately after the purchase by the complainants, they went into possession and went to mining, and soon discovered a valuable lead mine. Rector's answer denies fraud and combination, and insists on the Statute of Frauds, and also on the Registry Act; insists on inadequacy of price, and fraud and suppression of truth by complainants. Bean's answer insists on fraud in complainants in suppressing the truth, inadequacy of price, etc.

After Bean and Rector had answered, they moved for leave to file the pleas of the Statute of Frauds, which leave was refused.

This is not assigned for error, nor a point made in argument. I suppose whatever point might have been made on this matter is abandoned. At all events the pleas are clearly bad, for the same reason that I will hereafter show Oden's plea is bad; they are the same as Oden's in substance and form.

The court ought to require, when its discretion is applied to, that the plea or amendment should be issuable in fact, which these pleas were not. They should also have been sworn to: Cooper's Equity Pleading, 231. Replications were put in to the answers of Bean and Rector, and then the cause as to them was set for hearing. Oden filed a plea of the Statute of Frauds, which was demurred to, and the demurrer sustained; he had leave to file an answer on terms, and having failed to do so, the bill was taken *pro confesso*, and set for hearing as to him also.

The matter of this demurrer was not argued at the bar, nor is at all mentioned in the points made by the appellants' counsel. I will, however, as it fairly comes up, bestow some attention on it. This plea contains no averment that the contract was not in writing, etc.

It should expressly aver that the contract was not in writing: Cooper's Equity Pleading, 256, 225 *et seq.*

This plea should also contain an answer to all the other parts not expressly denied by it.

It is true these reasons are not within the scope of those assigned by the demurrer, if I understand them rightly, but as the opinion of the court is for the right party, that opinion must stand.

As to the residue of this case, the appellants' counsel have made and relied on the following points:

First. That, taking all the testimony together, Keemle, as agent, executed no writing whatever.

Second. That the indorsement on the back of the receiver's certificate does not show what land is transferred, nor how much, nor for how much.

The third point of the defense against the decree is, that the complainants were guilty of unfairness, *suppressio veri* and *suggestio falsi*.

Fourth. That the price is greatly inadequate.

Fifth. That the Statute of Frauds covers the case, and therefore no specific performance can be decreed.

I will examine these points in the order in which I have stated them.

First, that Keemle did nothing in the name of Bean in writing. I admit Keemle did no act in writing. The evidence is, and the admission is, that Bean wrote on the back of the receiver's receipt "transferred," and signed his name thereto, with the express intent that Keemle might deliver the receipt to complainants, if they would give for the land one hundred dollars. No act in writing was left for Keemle to perform; what he had to do could not be done in writing, to wit: simply to deliver the paper when he was satisfied as to the one hundred dollars. If this transfer has any effect at all, (which I will consider hereafter,) it was delivered to Keemle like an escrow, the delivery of which is always *in pais*. If this had been a deed duly drawn and signed, and sent to be delivered by an agent to a particular person, provided he would pay beforehand a certain sum of money, and on presentation such person should pay the money, surely the delivery would be good, and the transaction good to pass the estate; so that there seems to me to be no difficulty as to this point, and the question as to agency presents no difficulty.

The second point to be considered is, whether there is sufficient connection between the receipt of the receiver and the transfer on the back thereof, to show what land or thing was transferred, and how much land, if any, and for what sum.

This transfer being on the back of the receipt does most satisfactorily satisfy my mind that it is the identical land mentioned in the receipt that is transferred. If the transfer had been on a separate piece of paper, without any other description than it has, then it would not be capable of itself to show what was transferred; but when a note, bond, or any other instrument, has the words "transferred to A." indorsed thereon, no one can reasonably be at a loss to know to what thing these words apply.

The remaining branch of this objection is of great import, and presents to my mind much difficulty, which is, whether the transfer should not show the consideration, which this

does not show. No doubt if it were not for the Statute of Frauds, the consideration could be shown by parol testimony. I will defer the further consideration of this branch of the objection till I come to consider the case under the objection which relates to the Statute of Frauds.

The third point is, that a specific performance ought not to be decreed, because the complainants suppressed their knowledge of a valuable lead mine being contained in the land. Many authorities are cited to sustain this point. I admit that if these things had been proved, the authorities would apply to a case that might arise, but which has not arisen in this case, and a solid objection might thus be formed against a specific execution of an agreement. The only evidence I can discover, looking that way, is that immediately after the sale to complainants, they took possession of the land and went to work thereon, and soon discovered a valuable lead mine.

That it was contiguous to their land and lead furnace; the circumstance of their contiguity might indeed enable them the more easily to discover the secret value of Bean's land, but it does not prove they did do so, though connected with the fact that they made a discovery soon after they began mining thereon. This discovery might well have been made without the least particular knowledge of any certain body of lead mineral being contained in the land. Whoever is at all acquainted with the operation of mining, must know that a man may live on land for half a century, may dig into it often and deep, and discover nothing of value; another may thereafter, or he may himself thereafter, by one day's labor, discover a mine of great value. All the mining that was done on this land before the complainants got it, was under the eye and inspection of Bean, from July till November, and then for a short time under the inspection of his agent; and the evidence is that for all this time, till the time of the complainants' purchase, nothing presenting the prospect of much profit had come to light; there is no evidence that the complainants were ever on the land, or had any communication with the agent or diggers belonging to Bean. This point appears to me to be wholly groundless.

The next point is, that the price was inadequate, the bargain a hard one, and that chancery will not decree a specific per-

formance where this is the case. This is true to a certain extent, but not true to the extent it must go to avail the appellants anything in this case. The authorities cited to support this position are, *Mortlock* v. *Buller*, 10 Vesey, 292; Sugden, 170. I have not got 10 Vesey. I find in Sugden, under this head, a reference to this authority, but Sugden cites it expressly to show that mere inadequacy of price is not a sufficient ground to refuse a specific performance (second American edition from fifth London, 190). In this same edition, 189, which I suppose is the authority referred to by the counsel above, Sugden says that "a court of equity can not refuse to assist a vendor merely on account of the price being unreasonable, and a specific performance will certainly be enforced if the price was reasonable at the time of the contract made, however disproportionable it may become afterward. If, however, a man be induced to give an unreasonable price for an estate, through the fraud or misrepresentation of the vendor, or by an industrious concealment of the defects in the estate, equity will not compel a performance."

The appellants to this point cite Pow. on Conts. 28, 152 to 159, and 200, 201. In this first citation I find the doctrine laid down by Powell that "inadequacy of price abstracted from all considerations, seems of itself (upon revision of the best authorities) to furnish no ground upon which a court of equity will set aside, or rather relieve, a party to a contract; the law of England never having fixed any proportion that the price should bear to the thing purchased. But if the cause of inequality of price be founded in circumstances from whence a court of equity may conclude that the consent to accept such was not free, or was conditional, being had under an impression that circumstances were otherwise than they were represented to the party accepting such unequal terms, in such case, if the party contracted with be acquainted and take advantage thereof, it will furnish ground for a court of equity to set such contract aside;" and I should suppose much more to refuse its aid.

It seems also if the seller be in want of money, and the buyer knew this, and helped to enthrall him, equity will not help the buyer: Same book, 156.

In the same book, 200 and 201, Mr. Powell says that "an

agreement for the sale of an estate, which, from the nature of it, when compared with the circumstances of either of the parties to it, furnishes decisive evidence of his being surprised, will be set aside in equity, although there be no surprise, fraud or circumvention actually proved, and though a conveyance had been made pursuant thereto." The case of *Whorwood* v. *Simpson*, 2 Vernon, 186, is cited to support this position. The position taken by Powell is a strong one, and I have no doubt, is supported by the case cited by him; but I doubt if the case cited by Powell is sound either in principle or law; but suppose it to be correct, I can not see that it is like the present case, according to the report given of it by Mr. Powell. It was a case where a steward had for many years been employed in the management of an estate; he articled with a person employed by the owner to become the purchaser at £15,000, and by the articles it was agreed that he should either pay the whole money or might return land to make up what he paid short in money of the £15,000, and he obtained a conveyance of a part at an under-value, alleging that it was not material what sum was mentioned to be the consideration, and he had sold other parcels and paid money to the amount of £4,500 as the vendor appointed, and he now offered to return so much of the land as would make up the £15,000.

The court, on a bill brought for that purpose, set aside the articles and the conveyance made to the vendor, except as to what had been sold, declaring that they looked upon the vendee but as an agent for the vendor, and one in whom he had reposed great trust and confidence, which the vendee had deceitfully abused; and that the articles, themselves, seemed to manifest surprise, the vendor having occasion to sell to raise money, and yet the articles left the vendee at liberty to pay as small a sum as he pleased, and return what of the land he pleased to make up the value. Mr. Powell adds, "that the court assumed a greater latitude in this case, because the time fixed by the articles at which he was to pay or return the land had elapsed." As to the ground which the court took in this case, that this steward was to be considered the agent, and that he had abused his trust, the case does not show at all that the vendee was in any respect the agent for the sale of the land; and it does show that for that purpose there

was another person employed, yet because he was agent for the management of the estate, they make him agent for the sale also. I admit that this, on the part of the vendor, was a foolish contract; but that every bargain, which is not a wise or saving one, should of itself and for that reason furnish manifest ground of surprise, I deny. If this be law, the trading business of the country would ultimately fall into the hands of courts of chancery.

But in the case at bar, there was no trust reposed in the appellees; there is no evidence they had any special secret means of knowing that Bean was about to be surprised. Bean had mined on the land from July till November with others under him, and in that time he did not find this valuable lead mine. Bean says he bought the land with a hope that it contained lead, and doubtless the appellees hoped so too when they bought of Bean; but that they knew of anything particularly valuable, there is no evidence. We have seen from Sugden, 189, that the price must be inadequate at the time, and it must be grossly so. In the case *Gwynne* v. *Heaton*, 1 Br. Ch. Ca. 9, (cited by Bridgman's Index, p. 57,) Law is said to have observed that to set aside a conveyance, there must be an inadequacy so strong, gross and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inadequacy. Lord Eldon (in *Coles* v. *Trecothick*, 9 Vesey, 246, Bridg. Index, 57,) is reported to have said, inadequacy of price does not depend upon giving *pretium affectionis* from any peculiar motive beyond what another man would think the reasonable price; but unless the inadequacy of price is such as shocks the conscience, and amounts, in itself, to conclusive evidence of the fraud in the transaction, it is not a ground sufficient for refusing a specific performance. Accidental subsequent advantage made of a bargain, is no evidence of inadequacy. From a view of these authorities, I can see no ground to refuse a specific performance. If any evidence existed to show that the complainants were in possession of important facts, and that they concealed them from the other party, then inadequacy of price might raise a strong presumption of fraud.

The next and last point is, that this case is within the Statute of Frauds. Our Statute of Frauds is in terms, as to this particular matter, a copy of the English statute of 29 Chas. II.

By way of obviating this objection to the decree, the complainants rely on a part performance:

First. The payment of the purchase money.

Secondly. Being let into possession. The evidence is clear enough that the purchase money was paid. Whether payment of the purchase money is to be considered part performance, the authorities are contradictory: Sugden, 87; the cases are brought together, and I think the better authority is, that payment of the purchase money is no part performance. See Lord Redesdale's opinion in the case of *Clinan* v. *Cooke*, 1 Scho. & Lef. 22, 40.

The next inquiry is, whether being let into possession is such a part performance as takes the case out of the statute. It seems to be agreed by the English chancellors that a delivery of possession by the vendor to the vendee, shall be considered a part performance and take the case out of the Statute of Frauds: Sugden, 84. I think, however, that question can not be discussed now. I can find no evidence that there was any delivery of possession. The evidence on this point is, that immediately after the sale as aforesaid, the complainants entered upon the possession of the land, and thenceforth continued to possess and occupy the same as owners, with the knowledge of said Bean, until July; that they soon made a discovery of lead, and that after the knowledge of the discovery came to Bean, he recognized the sale and expressed himself well satisfied, etc. Here was no delivery of possession, but there was a taking possession. Now if it appeared that Bean lived near the spot, and saw the complainants occupy, and made no objection, I should take it to be strong evidence that they took possession by his leave. The fact that they took it and exercised ownership over it, and that Bean knew it, does not, in my opinion, amount to a delivery of possession; for aught appearing on the record, Bean might, at the time they took possession, and afterward while they kept it, have lived in a distant country. I understand the possession should be delivered, and the object and reason of the delivery should be clearly made out to have been in pursuance of the agreement, without which a British chancery court would not take possession to be part performance. Neither of these points being sufficient to take the case out of the

Statute of Frauds, I will proceed to investigate the remaining point, which is, whether the agreement is, itself, sufficient to take the case out of the statute. The words of the act of the General Assembly of the Territory of Missouri (which was in force when this transaction came into being) are, that "no action shall be brought whereby to charge any executor or administrator upon any special promise, to answer for any debt or damages out of his own estate, or whereby to charge the defendant upon any agreement made in consideration of marriage, or any contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them, or any lease thereof, etc., unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged," etc.

There is no provision in our Statute of Frauds similar to that section in the British statute which respects the sale of goods. I think this territorial act must govern this case, as it was in force at the time this transaction came into existence, though it was repealed in 1825. For whatever rights and liabilities the parties created or incurred at the time of this transaction, those rights and liabilities still remain.

The statute says, "no action shall be brought on any contract for the sale of land." I do not so much consider this transaction a contract for the sale of land as a contract whereby land is actually sold; it is, nevertheless, a case embraced by the statute; as it is a contract for an interest in land, I consider it an equitable sale, and equity raises a corresponding duty on the seller to make the title good at law, unless the statute interposes to prevent it. I consider this transfer sufficiently certain as to the thing sold, and certain as to quantity of interest sold. It is not like the case in Sugden, much relied on by the appellants; that appears in the text to have been a case where an estate was sold for a certain number of years, purchased with a rent reserved, and the court could not ascertain a portion of the rent; but Sugden himself cites by his reference a number of cases, *contra;* and note 1, at the bottom of the page, denies that the point as stated by Sugden is to be found at all in the register: Sugden, 65, 2d American edition.

But it is contended by the appellants' counsel, that this

transfer or contract should show the consideration as well as the thing to be done.

There is much difficulty on this point. We will examine whether the consideration, cause or inducement to make an agreement or contract is necessary to appear in writing or memorandum, to be signed by the party to be charged therewith.

On the one side it is contended that the consideration of the agreement must be in writing, as well as the thing to be done on the part of the seller of the land, and that in this case the word "transferred" on the back of the receiver's receipt imports no consideration. In the identical clause in question respecting a contract for the sale of land, I find no decision, but on that part which says no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, etc, there have been several decisions. The first on this subject took place in 1804 in the Court of King's Bench, in England, and reported in 5 East, p. 10, by the name of *Wain* v. *Warlters;* the case appears to be a case where one person undertook in writing to pay the debt of another, in consideration of forbearance to sue.

On the trial the plaintiff gave in evidence the following note: "MESSRS. WAIN & Co.:—I will engage to pay you by half-past four this day fifty-six pounds and expenses on bill, that amount on Hall. [Signed] JNO. WARLTERS." Dated, etc.

On this it was objected on the part of the defendant, that though the promise to pay the debt of another was in writing, yet as it did not express the consideration of the promise, the promise was void by the Statute of Frauds and Perjuries. The Court of King's Bench decided that the consideration must be in writing as well as the special promise to pay the debt of another: 5 East, p. 10.

The next decision relating to this subject was made in the year 1805, by the same court—6 E. R. 307, *Egerton* v. *Mathews.* This decision took place on the 17th section of the British statute, which says, "no contract for the sale of goods

for the price of £10 or upwards, shall be good, unless the buyer shall accept part of the goods as earnest, or pay a part of the price; or unless some memorandum or note of the bargain be in writing, signed by the party to be charged by such contract," etc. In this case the court held, that a note or memorandum of the bargain, was sufficient to satisfy the statute, without the consideration of that bargain being in writing. This is, in principle, a decision contrary to the former. By a note appended to the case *Packard* v. *Richardson*, in 17 Mass. 144, it seems in 1821 the Court of K. B. unanimously affirmed the doctrine in the case *Wain* v. *Warlters*. These cases and the case of *Goodman* v. *Chace*, decided in 1816, are the only cases decided by British courts relating to the points under consideration. But in the latter case the point was waived. In the United States, the first case on this subject is that of *Sears* v. *Brink*, 3 J. R. 210, in New York, in which the court recognized the doctrine in the case of *Wain* v. *Warlters*. The next case is that of *Leonard* v. *Vredenburgh*, in which the same doctrine is recognized, but not without some expressions of dissatisfaction: 8 Johns. 37.

The doctrine in *Wain* v. *Warlters* was mentioned in the case of *Violett* v. *Patton*, 5 Cranch, 142, in which it was thought by the court that the doctrine did not apply to the case then before them, so that this case amounts to nothing. The last American case I have found is that of *Packard* v. *Richardson*, 17 Mass. 122. In this case, Ch. J. Parker reviews the whole of the foregoing cases, so far as they relate to the question whether the consideration to pay the debt of another must be expressed in writing, as well as the promise.

In this case the doctrine in *Wain* v. *Warlters*, and the New York cases, are overruled. The court express their views at large, and with more reason to my mind than any other case I have seen.

The case of *Wain* v. *Warlters* was always denied by Lord Eldon to be law; see Vesey, jun., *ex parte Gordom*. In this case he decides expressly to the contrary of that case: 15 V. jun., 286.

Thus it appears that great authorities are arrayed on both sides of the question.

It has been said often, that the case of *Wain* v. *Warlters* was never well received in England, and that the great authority of the Court of K. B. could not satisfy Lord Eldon, the British bar, nor that great man, Kent; see *Leonard* v. *Vredenburgh*, 8 Johns. 37. In this view of the subject, the question is still open to us, to receive that decision which, in the opinion of the court, shall best comport with the words and reason of the Statute of Frauds.

In the act of this State, as well as that of England, the title is, "An Act to Prevent Frauds and Perjuries." Our act was passed in January, 1815. What might have been the evils intended to be remedied by the English act, I can not at this remote period of time undertake to determine with certainty. But from the dicta of judges and lawyers, it may be supposed that frauds and perjuries had become so common and alarming in their consequences, that the legislature thought it expedient to provide a remedy. The 4th section of the statute of 29 Charles II, was adopted by our legislature. At the same session they adopted the common law and some of the British statutes, down to the time of the 4th of James I. The Statute of Frauds being subsequent, was not in force, and the legislature thinking it a good law, enacted it with a view of preventing frauds and perjuries. But I can not think, at that time, either frauds or perjuries were so alarming as to require such a signal legislation.

Our legislature, no doubt, enacted the statute more with a view to the future times, more in reference to what frauds and perjuries might arise, than with an eye to those already existing. The moral history of this country at that day will afford but little light on the reason of making the statute. But when the British statute was passed, we know the moral condition of that country was desperate, but what the particular evils were, which drew forth the statute, I have never learned.

We know that England had not long emerged from the horrors of a dreadful civil war, and that it was then rapidly assuming a permanently reformed government, whence it may be expected that real estate was thought to be rapidly rising in value, and investments of money in real estate presented a greater prospect of profit than anything else. In our own country, after our short war, in 1816–17 and 18, men seemed to

think the possession and ownership of real estate, was the chief human good. When lands rose to enormous prices, men parted with their money freely without much regard to quantity, for land. If, then, such might have been the case in England, we may suppose the legislature thought lands too valuable to be passed by mere verbal agreement, and I do suppose, also, that witnesses could be found, and were found, who would swear a man's real estate away on a pretended parol agreement. To prevent such frauds, and to close the door to such perjuries, I suppose the statute was made. That part of the statute which it is our business to consider, says, "no action shall be brought upon any contract for the sale of land, unless the agreement or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or his agent." From the peculiar manner in which this statute is worded, I am led to the conclusion that it was not intended the whole of this agreement or contract on both sides, should be reduced to writing; when the statute speaks of the action to be brought on a contract for the sale of land, it no doubt embraces in its view both sale and consideration. But it forbids the action being brought, unless something else collateral should first be done and that is, that the agreement to sell be in writing, or at least a note or memorandum should be made, and this agreement or note thereof is to be signed by the party to be charged therewith. This latter requisition convinces me that the legislature did not intend that all matters relating to the price, and time when to be paid, must necessarily be contained in this note, memorandum or agreement; otherwise they would have declared that both parties should sign the agreement or note. I take the word agreement here in its popular sense, without reference to the consideration or reason for making it. A note or memorandum is something less than the main subject in detail, and if the note only says: witness that A agrees to sell to B, a piece of land in fee, and A should sign this, I hold the statute is satisfied as to A, but if B refuses to take the land, then B must show on suit for a specific performance, such note signed by B. In my opinion, this is all the statute requires, and the vendor and vendee must each look to his own part of the transaction in case of future difficulty.

The decree of the circuit court is affirmed, with costs.

WASH, J., dissenting.

I dissent from the opinion of the court on two grounds, mainly:

First. The bill seeks the specific execution of a contract, made by Keemle as agent for Bean, and there appears to me no evidence, either of his authority to contract, or of a contract executed, etc.; and

Second. I think the true construction of the Statute of Frauds, etc., requires that the consideration should be expressed in writing as well as the contract, and in this case there appears to me neither contract nor consideration, so expressed as to take it out of the statute.

FLINT v. BRANDON.

(8 Vesey, Jr., 159. The Rolls Court, 1803.)

Covenant to restore gravel pits. A court of equity will not decree specific performance of a covenant by the lessor to fill up gravel pits upon the premises intended in the demise, the legal remedy for breach of the covenant being ample.

[1] **The principle upon which specific performance is decreed is that the legal remedy is inadequate or defective.**

By indentures of lease dated the 29th of July, 1789, Samuel and Thomas Brandon demised to the plaintiff, his executors,

[1] The ground of the jurisdiction of courts of equity in such cases is, that a court of law is inadequate to decree a specific performance, and can relieve the injured party only by a compensation in damages, which in many cases would fall far short of the redress which his situation might require. Wherever, therefore, the party wants the thing in specie, and he can not otherwise be fully compensated, courts of equity will grant him a specific performance: 1 Fonbl. Eq., b. 1, ch. 1, § 5, note (o); *Harnett* v. *Yielding*, 2 Sch. & Lef. 553; *Errington* v. *Aynesly*, 2 Bro. C. C. (Am. Ed. 1844) 341–243 and notes; *Madison* v. *Chinn*, 3 J. J. Marsh. 231; *Cathcart* v. *Robinson*, 5 Peters, 264; 2 Story Eq. Jur., § 716; *Sears* v. *Boston*, 16 Pick. 357.

The jurisdiction of courts of equity to decree specific performance may be distinctly traced back to the reign of Edward IV: 8 Edw. IV, 4 b; 2 Story Eq. Jur. § 716; Fonbl. Eq., b. 1, ch. 1, § 5, note (o); *Mosely* v. *Virgin*, 3 V. Jr. 184, note (a). See *Lucas* v. *Commerford*, 3 Bro. C. C. (Am. Ed., 1844) 166, 167, and notes.

etc., a piece of ground called the Gravel Pits, at Newington, containing two acres, twelve poles, then in the possession of Thomas Clutton, to hold from the 29th of September, 1799, the day on which the lease to Clutton would expire, for the term of twenty-one years; nevertheless the same to be put into the possession of plaintiff in the same state and condition as it was so expressly covenanted, declared and agreed to be yielded up by the said Thomas Clutton, his executors, etc., unto the original landlord in and by the lease granted to Clutton, paying the yearly rent of £12, with all the usual covenants.

This lease contained a covenant by the lessors that the plaintiff, his executors, etc., should, at the expiration of the then existing lease to Clutton, be put into possession of the said premises thereby demised; and that the same premises should be then in the same state and condition as he, the said Thomas Clutton, for himself, his executors, etc., did covenant, etc., to and with the original landlord, his heirs, etc., to leave and yield up the said premises. They also covenanted to grant to the plaintiff two further terms of twenty years each in succession on payment of a fine of £2.

The original lease was granted by Henry Penton to Clutton for a term which expired on the 29th of September, 1799; and by a memorandum indorsed dated the 8th of June, 1779, it was declared that it should be lawful for Clutton, his executors, administrators and assigns, to break up or dig for gravel any part of the land; and he thereby, for himself, his executors, administrators and assigns, covenanted to pay the sum of £20 for every acre he should so break up or dig, and to make good the same at or before the expiration of the within lease.

Samuel and Thomas Brandon purchased this piece of ground from Penton. Thomas Brandon and Clutton died.

The bill, filed in 1800, against Samuel Brandon and the executors of Thomas, prayed that the defendants may be decreed specifically to perform and carry into execution the grant, covenants, and agreements made with the plaintiff by the said indenture; and that they may be ordered to put the plaintiff in possession of the piece of ground so demised to him in such state and condition as Clutton, his executors, etc., ought to have made good the same.

The answer stated that the plaintiff was in possession; and

submitted that, if the plaintiff has any demand, it is by action of covenant, and not by suit in this court.

Mr. RICHARDS and Mr. WINGFIELD, for the plaintiff.—This covenant to fill up a gravel pit is clear, and not like the case of building a house; as to which, however, there is a distinction taken according to Lord Rosslyn's opinion in *Mosely* v. *Virgin*, 3 Ves. Jr. 184, referring to the case of the Clergyman's House, *Allen* v. *Harding*, Eq. Ca. Ab. 17. This is as specific as the covenant in that case, or the *City of London* v. *Nash*, 3 Atk. 512, 1 Ves. Jr. 12, being merely a covenant to level the ground. It would be difficult to frame a declaration from the uncertainty of the expense.

Mr. ROMILLY and Mr. MARTIN, for the defendant.—The prayer of this bill can not be complied with, the plaintiff being in possession. If such a bill as this can be filed, why not for specific performance of a covenant that a lessee plowing up meadow shall lay it down in grass, or that a tenant shall cultivate in a husbandlike manner, etc.? The point upon a covenant to build is very doubtful, upon the *City of London* v. *Nash*, and *Lucas* v. *Commerford*, 3 Bro. C. C. 166; 1 Ves. Jr. 235; see the note; upon which last case it has rested. In the Monmouthshire case, as to the wharves, the lord chancellor cautiously avoided giving his opinion. That was a case of the wharves, etc., being particularly pointed out by the act of Parliament. What can be more vague than the words of this covenant "make good the same"? It must open to a great deal of inquiry, what this land was before it was broken up. But this is clearly matter of pecuniary compensation. Without doubt an action of covenant would lie; and evidence might be given as to the expense of putting the land in that condition. In the instance of the common covenant to drain land, a specific performance, though much more convenient, was never heard of. Bills of this kind have been confined to sales of estates with the single exception of the *City of London* v. *Nash*, which is much shaken by the later authorities. Why would not this relief be given equally upon any personal undertaking—to transfer stock; to deliver a certain quantity of hops; to roof or new floor a house? The object in those

cases is as specific and certain; yet upon every such attempt the bill has been dismissed with costs. The true ground of a specific performance is a remedy more efficacious than that the law can give; and that a verdict would not give the specific thing. How is this to be followed up? When will the covenant be satisfied? Is the master to report upon it?

MR. RICHARDS, in reply.—The mere question is whether this plaintiff is to have what it was agreed he should have. That the engagement is clear to fill up a gravel pit and leave it as it was before, can not be disputed. If the meaning is to deliver the land, as the original lessee ought to have delivered it, the performance will be compelled, though the time has expired. Though a compensation by damages might be given, there is a right to a specific performance. So a covenant to build a house admits compensation, yet if the object is sufficiently defined, a specific performance may be had. Upon a covenant to sell free from incumbrances, an action would lie, but this court would compel the vendor to pay off the incumbrance.

THE MASTER OF THE ROLLS (Sir William Grant).

This court does not, I apprehend, profess to decree a specific performance of contracts of every description. It is only where the legal remedy is inadequate or defective, that it becomes necessary for courts of equity to interfere. In *Errington* v. *Aynesly*, 2 Bro. C. C. 341, Lord Kenyon says, "a specific performance is only decreed where the party wants the thing in specie, and can not have it any other way." I will not say courts of equity have in every instance confined themselves within this line; but this being the principle, I will not deviate from it farther than I am bound from deference to precedent and authority. In the present case complete justice can be done at law. The matter in controversy is nothing more than the sum it will cost to put the ground in the condition in which, by the covenant, it ought to be. The plaintiff will be entitled to recover damages in an action for breach of the contract. In some respects, the legal remedy is better than any this court can give; for the plaintiff, recovering and having the disposition of the money, may perform the work

in such manner as he thinks proper; whereas if a specific performance is decreed, a question may arise, whether the work is sufficiently performed. The jury may also take into consideration any injury to him by not having performed at the commencement of the lease, but this court can only decree a performance now.

As to the cases upon building contracts, it is unnecessary to make observations upon them. If it is settled that such contracts should be specifically performed, I should think myself bound to follow that course without inquiring whether it is strictly consonant to principle.[1] But I am not barred from that inquiry, where a contract of another species is, for the first time, brought into this court for a specific performance. No instance of a specific performance of such a covenant as this has been produced. Therefore I am at liberty to do what, upon principle, ought to be done to dismiss this bill.[2]

BOWMAN v. IRONS.

(2 Bibb, 78; 4 Am. Dec. 686. Court of Appeals of Kentucky, 1810.)

[3] **Delay—Inadequate consideration and concealment of knowledge of salt spring—Defense to special performance.** Where a vendee, as the defendant alleged, having discovered a valuable salt spring on the land, concealed his knowledge of the same from the vendor, pretending that the purchase was made for the wood on the tract, the price agreed upon proving wholly inadequate when the existence of the spring came to be considered, the vendee further being in default by delay in tender of installments, it was *held:* that the plaintiff should have no decree for a specific per-

[1] An agreement to build a tavern, in partnership, at the joint expense and risk, and for the joint benefit of the contracting parties, to be held by them in fee simple, was decreed to be specifically performed at the instance of a partner who furnished the ground for the purpose, and had fully performed the contract on his part. *Birchett* v. *Bolling*, 5 Munf. 442.

[2] "The just conclusion," as Mr. Justice Story observes, "would seem to be, that courts of equity ought not to decline the jurisdiction for a specific performance of contracts, whenever the remedy at law is doubtful in its nature, extent, operation, or adequacy." 2 Story's Eq. Jur. § 728.

[3] *Booth* v. *Smith*, 117 Ill. 370.

fermance, although his knowledge and concealment of the salt springs was not conclusively shown, as the delay and inadequacy of consideration of themselves would be sufficient to defeat relief of that kind.

The case is stated in the opinion.

By the Court, CLARKE, J.

Irons exhibited his bill in the late District Court of Bardstown, to enforce execution of a contract made with Bowman for the purchase of one hundred acres of land, for which he received his bond for a title. Bowman exhibited his bill in the same court, for a rescission of the contract, alleging that Irons had not performed his part of it, and that previous to his purchase he had discovered a very valuable salt spring on the land, which he concealed from him at the time of making the contract, pretending the purchase was made for the benefit of the wood. That the land sold, with the spring, is worth between five and twenty-fold more than the price engaged to be given. In opposition to the claim of Irons to relief, Bowman relies upon the fraud before stated, and the failure of Irons to pay the consideration, which was to have been discharged in salt.

The court decreed Bowman to convey the 100 acres of land, and dismissed the bill brought by him to annul the contract; from which he appealed to this court.

Chancery will not aid in compelling the specific execution of an agreement, unless it has been fair and reasonable: 2 Vern. 632; Pre. Ch. 538. Nor then, if the contract be merely executory, and the party praying relief has not performed the covenants which ought to have been performed on his part. On examining the doctrine upon this subject, it will be found that the courts of chancery in England have acted with caution upon subjects where the party can have an adequate remedy at law, and have in most cases refused to decree a specific execution of executory contracts, unless the party applying has in some measure performed his agreement so that the rules of the common law would not afford complete redress.

Applying these rules to the case before us, the inferior court erred in decreeing Bowman to convey the 100 acres of land in the bill mentioned.

From the circumstances in this case, it would be unreasonable and unjust to compel a conveyance. Though the testimony is not conclusive that Irons knew there was salt water upon the land, before he made the purchase, yet it produces a strong belief that he did know it, and concealed the fact from Bowman. If that fact was sufficiently proven, agreeable to the principle in the case of *Bowman* v. *Bates*, decided this term (6 M. R. 363), we should not hesitate to decree a rescision of the contract. But combining the inequality of price agreed on, with the real value of the land, the failure on the part of Irons to comply with his part of the agreement, his occupancy of the land from the spring, 1799 (the time of making the contract), his retention of the purchase money, with his supposed knowledge of the salt water at the time of making the agreement, destroy his right to demand a specific execution on the part of Bowman. The property, at the time of making the contract, was supposed to be worth one hundred pounds; it is now proven to be worth from six hundred to a thousand. The contract was made in the spring of 1799; the price was to have been paid in salt at twenty-four shillings per hundred, in three installments; the last became due in June, 1800. He neither paid or tendered the salt when it became due, nor has he in his bill declared a readiness or an offer to perform his part of the agreement. He who demands the execution of an agreement, ought to show that there has been no default in him, in performing all that was to be done on his part; if either he will not, or can not, through his own negligence, perform the whole on his side, he has no right to the performance of the other party, since such performance could not be mutual: 1 Fonb. 383. The bill of Irons ought to have been dismissed, leaving the party to his remedy at law.

Decree on the part of Irons reversed, etc.; decree dismissing Bowman's bill affirmed, with costs.

STEVENS V. GUPPY.

(3 Russ. Ch. 171. High Court of Chancery, 1826.)

[1] **Defective title excuses vendee of land.** A vendee of an interest in iron-works, entering and acting as a partner, although charged with gross mismanagement and destroying the value of the property, can not be decreed to accept specific performance and to take a defective title and will not be presumed to have accepted such title; nor can an account of damages be taken and decree for compensation made upon bill framed only for specific performance.

[2] **Rescission after entry.** A vendee, by his entry and acting as a partner in an iron concern, does not waive the benefit of a contract for good title, and may rescind upon failure to receive such title.

The object of this suit was to enforce the performance of the contract of the 11th of June, 1818, which has been incidentally mentioned in the case of *Jefferys* v. *Smith*, 3 Russ. 158. That agreement was in the following words:

"William Stevens agrees to sell, and Samuel Guppy agrees to purchase, the said William Stevens' three-sixteenth shares in the Coseley ironworks, including the freehold, leasehold and copyhold lands, buildings, mines, minerals and all furnaces, forges, mills, machinery, implements, tools, cattle, stock of iron, coals, iron-stone, lime-stone, cokes and all other property, movable and immovable, belonging to the said concern, of and to which he, the said William Stevens, is possessed and entitled, jointly with John Jefferys, David Smith and the assignees of George Stokes, a bankrupt, except only his three-sixteenth parts of such debts as were due or owing to the said concern on the 28th of March last, for the sum of £8,000, free from all incumbrances or liabilities affecting the same three-sixteenth shares, which the said William Stevens is to pay, or allow the said Samuel Guppy to deduct and retain out of the said purchase money of £8,000. All debts due and owing to the said concern up to the 28th of March last, the said William Stevens is to retain his proportion of; and he is to bear and pay his proportion of all debts and liabilities which the said concern owes and was subject to on the 28th of March last; but the said Samuel Guppy is to receive and pay three-six-

[1] *Noyes* v. *Johnson*, 139 Mass. 436; *Macbryde* v. *Weeks*, 13 M. R. 344.
[2] *Haywood* v. *Cope*, 6 M. R. 499.

teenth parts of all debts contracted with or by the said concern since the 28th of March last; William Stevens, on or before the 24th of June, 'next,' (the word 'next' was in the bill; it was not in the copy of the memorandum which was produced in court) at his own expense, is to deduce a good title to the premises hereby contracted for, and to convey, assign and surrender the same to the said Samuel Guppy, free from incumbrances, except rent and royalties which the said lands and mines are subject to and shall have become due since the 28th of March last, and the said Samuel Guppy is to pay the expense of the conveyances, assignments and surrenders to himself of the said premises contracted for, except such fines on the surrender of the copyhold property, as may become due to the lord or lords of the manors respectively, wherein such copyhold property is. The said William Stevens engages that the accounts of debts contracted with and by the said concern, since the 28th of March last, are correctly stated in the books of the said partnership concern. The balance of the purchase money to be paid as soon as a good title can be effected, the incumbrances and liabilities and conveyances, assignments and surrenders as aforesaid, made in the said Samuel Guppy's bill or bills in London, at three calendar months after date, and to be dated at that time."

At the foot of the agreement was the following memorandum, showing the mode in which the price was estimated:

For three-sixteenths of the Coseley ironworks, £32,000,	£6,000
For three-sixteenths of stock in trade, £8,035,	1,500
For the profits of the three-sixteenths since Lady-day,	500
	£8,000

Stevens immediately, with the privity of the other copartners, retired from the concern, and gave possession of his shares to Guppy, who acted as the owner and conducted the business in the manner, and until the time more particularly mentioned in the report of *Jefferys* v. *Smith*.

In June, 1819, Stevens filed his bill for specific performance, and it was amended in June, 1820. He had been induced, he said, to admit Guppy into the possession of the shares, in con-

sequence of his having promised to pay the purchase money immediately. Many requests, he alleged, had been made to the defendant specifically to perform his agreement, "or otherwise to let him, the plaintiff, into the possession of his three-sixteenth shares of the partnership concern, estates and property;" and he insisted that the defendant, by continuing to act as the owner of the shares and as a partner, had accepted the title. The bill charged that Guppy and his partners had first mismanaged, and then put an end to the business, and that they had removed from off the premises, all or the greater part of the movable machinery, implements and stock in trade; that by such conduct the copartnership concern had been ruined or greatly deteriorated, and rendered of much less value than when the plaintiff relinquished possession to Guppy; that the established connections of the copartnership with numerous highly respectable customers had been thereby lost, so that, even if the ironworks could be restored to the state in which they were when Guppy entered into possession, yet it would be impossible to recover the old established connections with the former customers. The prayer was, that Samuel Guppy might be declared to have waived all objections to the title to the shares, and might be decreed specifically to perform the agreement, and that, in the meantime, he might be directed to pay the purchase money into court; or otherwise, that a proper person might be appointed as a receiver or manager, to collect the rents, issues and profits of the shares of the partnership concern so contracted to be sold, and to manage the same; and that the defendant might be restrained from interfering or meddling with the shares or with the rents, profits and produce thereof. It concluded with the common form of words, asking relief generally.

Guppy, by his answer, admitted the agreement, and stated that he had always been willing to perform it, if a good title were shown, but that no abstract had ever been delivered to him. He denied that he had ever promised to pay the purchase money before the title was perfected, or that possession had been given him in consequence of any such undertaking on his part. He stated that he had assigned one of the three shares to Spurrier, and the other two to Hodgson, who had since transferred them to T. R. Guppy; and that the latter

was unable to pay for them, and would willingly restore them to the plaintiff. He denied that he had been accessory to any mismanagement of the property, or that he had received any part of the rents, issues and profits of the shares, which were the subject of the contract; on the contrary, the partnership had become indebted to him during the period of his connection with it, and he submitted, whether he could be considered a partner, except in relation to the creditors of the concern. He was willing and desirous, he said, to give up the possession of the shares to the plaintiff, but the latter refused either to resume the possession or to make out a title.

The plaintiff entered into evidence, to prove the deterioration and destruction of the business, and the active interference of Guppy as a partner.

At the hearing, the vice chancellor directed the usual reference of title.

It turned out that the title was defective; and at the hearing, on further directions, the vice chancellor dismissed the bill with costs.

The plaintiff appealed, first, from the decree directing a reference of title, and afterward, from the decree made on further directions.

Mr. HEALD and Mr. LOVAT, for the appellant.

Mr. HART, Mr. PRESTON and Mr. ROMILLY, *contra*.

ELDON, Lord Chancellor.

I doubt very much whether there is not enough in this bill to enable the court to administer any equity arising out of the transactions that took place in consequence of the possession being given to Guppy. Does not the equity, insisted upon in the body of the bill, amount substantially to this, that the defendant may either specifically perform the contract, or that he may deliver back again the possession which he had received? And though the words, "that he may deliver back again the possession which he has so received," are not to be found in the prayer, yet, when the plaintiff asks by his bill a specific performance of the agreement, or such other relief as

the nature of the case requires—if the effect of the case which he states be, that if he is not entitled to a specific performance the possession should be restored to him, and an account should be gone into of the defendant's dealings with the property—it is worthy of consideration, whether the mere omission of alternative words in the prayer is sufficient to prevent him from having that equity (if such an equity there be) administered in this suit.

I take for granted that the decree of the vice chancellor was made with an intention on his part to pronounce that the title had not been accepted. For the reference would have been unnecessary, if he had been of opinion that the defendant was bound to accept the title, whether it was good or bad. The decree, however, contains no declaration either way. According to the old practice, there were two ways of framing a decree in a suit for specific performance. The one was, to declare that the plaintiff was entitled to a specific performance, if a good title could be shown, and then to direct a reference as to the title; the other to refer the title to the master, and to follow up that direction by a declaration that, if a good title was shown, the agreement ought to be specifically performed; and, in my opinion, difficulties may often arise from omitting to make a declaration in the decree.

The question now before me is two-fold: First, whether the defendant is bound to accept the title; secondly, if the plaintiff can not compel a specific performance, whether any other relief can be given him on the bill as it is now framed.

I must state the word "next" to be part of the contract, upon the authority of the plaintiff himself, because he has so stated it in his bill; and by "the 24th of June next," I understand the 24th of June, 1819. That is the natural construction of the words; and there is no evidence that it was understood between the parties that the abstract of the title could be immediately prepared, so as to be delivered on the 24th of that very month of June in which the contract was entered into.

The question comes to this: Does the ordinary rule about taking possession apply to such an agreement as the present? Was it the intention of the parties, regard being had to the express terms and stipulations of the contract, that Mr. Stevens

should be at liberty until the 24th of June, 1819, to keep possession of the property, which, if the agreement was ever carried into execution, was to belong, from March, 1818, to Mr. Guppy and not to Mr. Stevens? Or must it not have been the intention of these parties, considering what the period was at which the beneficial interests and the liabilities were to begin, that the possession should be taken immediately, nevertheless, with an unfortunate contract on the part of Mr. Stevens that he would deliver the abstract, deduce a good title and convey the premises, not then, but on or before the 24th of June, 1819? And can it be said, under the effect of such an agreement as this, that the mere taking possession is a waiver of the right to have the title made out, which, by the very terms of the contract, was not to be made out till fifteen months after the beneficial interest and liability (both of which were to begin nearly three months before the date of the contract) had commenced?

The bill alleges that the possession was taken, because Guppy prevailed upon the vendor to let him take possession on condition of his immediately paying the purchase money; but of this new bargain I have heard no evidence whatever. Under these circumstances, I think that the mere taking possession would not amount to a waiver of all objections to the title. It is a different matter, how far the use which has been made of the possession, the management to which it has been exposed, the deterioration of the concern, etc., are to entitle the plaintiff to relief against the party who contends that he had a right under the agreement to immediate possession, and yet was not bound to retain that possession unless a good title could be shown.

If the question as to what may be due between the parties, in respect of the dealing with the property, be not open on this record, the decree ought to be without prejudice to any future bill on the subject.

Judgment not having been pronounced when Lord Eldon resigned, the appeal was again argued before Lord Lyndhurst.

1827, December 5, 6. Mr. HEALD and Mr. LOVAT, for the plaintiff.

MR. SUGDEN, Mr. PRESTON and Mr. ROMILLY, for the defendant.

1828, April 16. LYNDHURST, Lord Chancellor, after stating the outline of the facts of the case, expressed his opinion to be, that, looking at the terms of the agreement and the nature of the property which was the subject of it, nothing had been done which amounted to a waiver, on the part of the defendant, of his right to have a good title. It is now admitted, continued his lordship, that, as to some of the lands which formed an essential part of the property of this partnership, a good title can not be shown; and therefore the vendor can not have a decree for specific performance.

It is then said, that, though he can not have the contract performed, he is entitled, upon the frame of this record, and under the prayer for general relief, to a remedy of a different kind; namely, to have an inquiry concerning the management of the partnership by Guppy, and to have compensation for the injury he, Stevens, has sustained. It is true that the bill does contain charges of mismanagement of the property by Guppy; but with what view and for what object are those charges introduced? We have only to look at the record to see that they are introduced, not with a view to demand compensation for any loss alleged to have been sustained, but in order to establish the fact of acceptance of the title by the defendant, and of waiver of all objections to it, and thereby to make out the plaintiff's right to specific performance. Under such circumstances, it would be unjust to allow the plaintiff to abandon the case made by his bill, and to come, at the hearing, for a new remedy upon a record framed with an aspect altogether different. My opinion therefore is, that, as the case is shaped before me, the plaintiff is not entitled, under the general words of the prayer, to particular relief with respect to the loss arising from the management of the property.

Besides, there were other persons interested in the partnership when the alleged mismanagement took place. How, under a decree between Stevens and Guppy alone, could all the liabilities be arranged, which may be involved in giving Stevens the compensation he asks? It is not in such a suit as

this that he can obtain compensation for the loss which he alleges he has sustained.

Lord Eldon, when the case was before him, stated that if he dismissed the bill, he should think it proper to add, as a qualification to the decree, that the dismissal should be without prejudice to any suit or proceeding which Stevens might think fit to institute for the purpose of recovering compensation for any injury or loss which he might have sustained by the acts of the defendant. This has been done in several cases, and an instance of it occurs in *Lindsay* v. *Lynch*, 2 Sch. & Lef. 12. I shall take that course, and shall modify the decree by a similar qualification.

BOOTH ET AL. v. POLLARD.

(4 Younge & Collyer, 61. Court of Exchequer, in Equity, 1840.)

[1] **Agreement to work in a particular manner.** The remedy in an ordinary case of an agreement to work a quarry in a particular manner is at law; specific performance refused.

The bill stated that previous to November, 1825, the defendant was, or pretended to be, seized of certain quarries called the Cliff Quarries, and contracted with the plaintiffs that the latter should work them. That by an agreement dated the 5th of that month, executed by the defendant of the one part, and the plaintiffs of the other part, the defendant agreed to let, and the plaintiffs agreed to take the bearings, gettings and workings of the seam of stone under that piece of ground, called, etc. And it was thereby agreed that the defendant should pay to the plaintiffs for common flags per ton £—, etc. (then followed a list of prices for different stones). That the defendant should provide a wagon for carrying, but that the loading should be paid for by the plaintiffs; that the plaintiffs were to work the quarries, and to be paid a certain sum monthly; that the stone was to be put on board a vessel monthly, and paid for monthly; and if not taken away by the defendant within a month, the plaintiffs were to draw for the amount on the next monthly day of payment.

[1] *Beck* v. *Allison*, 56 N. Y. 366; 15 Am. R. 430; *Abinger* v. *Ashton*, 6 M. R. 1; *Wheatley* v. *Westminster Co.*, 8 M. R. 553; *Pollard* v. *Clayton*, 13 M. R. 335.

The bill then stated that the defendant had made various defaults in payments, and that the plaintiffs had given him notice that unless the payments were made regularly, they must decline working the quarry; that there was now due from the defendants to the plaintiffs £400; that the plaintiffs had sent in their account, which had not been objected to, and had made repeated applications for payment, which had been refused; that in consequence of such refusal the plaintiffs had ceased to work the quarry, and that the defendant had lately commenced an action against them on the plea side of this court, for breach of the agreement in not continuing their work.

The bill, after charging that the defendant was in embarrassed circumstances, and that it was doubtful whether the plaintiffs had any right of set-off at law, and after charging in the common form as to books, papers and documents, prayed that the agreement might be specifically performed, for an account and payment to the plaintiffs of what was already due to them, and for an injunction to restrain the action.

The defendant demurred for want of equity.

Mr. STUART and Mr. ROGERS, for the demurrer, said that the court would not entertain a bill for specific performance of an agreement to work a quarry: *Flint* v. *Brandon*, 8 Ves. 159; *Rayner* v. *Stone*, 2 Eden, 128.

Mr. SIMPKINSON and Mr. DIXON, for the bill.—This is an equitable agreement, by which the defendant agrees to let to the plaintiffs certain stone quarries, and by which he contracts to pay the plaintiffs for working them certain sums at the expiration of each month; and on the part of the plaintiffs it is an agreement to work in a particular way. The agreement is not merely to work, but to let, and therefore the subject of specific performance as much as any other agreement. The plaintiffs are entitled to have the legal estate conveyed to them, and are not bound to rest satisfied with an equitable interest. Again, the defendant has agreed to pay the plaintiffs certain monthly sums, and these are matters of account. That an account has been delivered and not objected to does not alone make it a settled account. Besides,

the accounts are mutual, as there may be sums coming due from the plaintiffs to the defendant under the contract. If the £400 which the plaintiffs say is due to them is to be considered as acquiesced in and settled, it could not be set off at law against unliquidated damages for non-performance of the contract, and that is the ground of the defendant's action.

Mr. STUART, in reply, said that *Waters* v. *Taylor*, 15 Ves. 10, showed the difficulty as to specific performance in cases of weekly payments.

ALDERSON, B.—This is nothing more or less than an agreement to work in a particular manner. The plaintiffs may have no defense at law, because they may have no defense at all; but their remedy, if any, is at law.

Demurrer allowed.

GEIGER ET AL. V. GREEN.

(4 Gill, 472. Court of Appeals of Maryland, 1846.)

Injunction pending contest. Where the object of a bill in equity is to obtain specific performance of a contract, and the writ of injunction is prayed for only to protect the property—the subject of the contract—against the wrongful acts of the defendant, pending the contest, and until the right to specific performance shall be determined, that writ can not be maintained, unless the case presented by the bill would authorize a court of equity to enforce the contract.

[1] **Specific performance, when decreed.** Specific performance of a contract is not a matter of right in the parties, but depends upon the sound and reasonable discretion of the court; is granted or withheld according to the circumstances of the case; and the court must be satisfied that the contract sought to be enforced is fair, just and reasonable, equal in all its parts, and founded on an adequate consideration.

[2] **Specific performance of a privilege to mine not enforced.** O. granted to R. "the privilege of digging and moving the ore on that part of my place, joining W. and P.'s, at twenty-five cents per ton, for the privilege of ground; leave also to build a house on said land, etc., the materials to be got on my land, at R.'s expense." This confers the mere privilege of digging ore; is not compulsory; imposes no corresponding obligations on R., who might refuse to work the mine, and O. could not oblige him to work it. It contains no mutual or reciprocal engagements, and can not be specifically enforced in equity; consequently there was no ground for granting or continuing an injunction upon its stipulations.

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[1] *Carlisle* v. *Carlisle*, 77 Ala. 339; *Rutland Co.* v. *Ripley*, 3 M. R. 291.
[2] *Wheeler* v. *West*, 11 Pac. 872.

[1]**No preliminary injunction where ultimate relief improbable.** Upon an appeal against continuing an injunction, if the Court of Appeals perceives that the complainant has, and can have, no equity at final hearing, the bill will be dismissed.

Appeal from the Court of Chancery.

On the 8th July, 1846, Richard Green, relying upon the following agreement, to wit—

"BALTIMORE COUNTY, 10th December, 1838.

"I hereby grant to Richard Green the privilege of digging and moving the ore on that part of my place joining Wilderson's and Price's, at twenty-five cents per ton, for the privilege of ground; leave also to build a house on said land, the workmanship to cost $100, the materials to be got on my land at said Green's expense.

"CHARLOTTE C. D. OWINGS.

"JAS. W. OWINGS." "RICHARD GREEN."

—filed his bill, setting forth the same; that in virtue thereof he entered upon the land of the said C. C. D. O., and dug large quantities of ore therefrom, and paid her for the same; and should have continued to raise ore therefrom, but for an accidental mental affliction, which rendered him incapable of attending to business; that while he was so incapacitated, Christopher Geiger, acting on behalf of himself and others, etc., represented to C. C. D. O. that the appellee had abandoned his contract, and, by misrepresentation, induced the said C. C. D. O. to enter into some arrangement to sell to the said C. G. and others, a portion of the lands comprised in her agreement with him; that Geiger and his partners had full notice of the agreement, etc., with the appellee, when they made their agreement; that the said C. G. and partners are now raising ore, and unless restrained, will deprive the said R. G. of all benefit of his contract. Prayer for subpœna.

The county court, (ARCHER, C. J.,) awarded an injunction on bond being filed.

The answer of C. C. D. Owings admitted the bill.

After the coming in of the other answers, none of which denied the contract relied upon in the bill, nor notice of the existence of some agreement between the said C. C. D. O. and

[1] *International Co.* v. *Mills*, 22 Fed. 659; *Gold Tel. Co.* v. *Commercial Tel. Co.*, Id. 838.

Richard Green, but did deny all misrepresentation charged in the bill, a motion was made to dissolve the injunction. This motion, the chancellor, (BLAND,) on the 5th of November, 1846, overruled, and continued the injunction until final hearing.

The defendant appealed to this court.

The cause was argued before DORSEY, SPENCE, MAGRUDER and MARTIN, JJ.

By OTHO SCOTT and JOHN NELSON, for the appellants.

By MEREDITH and REVERDY JOHNSON, for the appellee.

MARTIN, J., delivered the opinion of this court.

This case comes before us by an appeal from an order of Baltimore County Court, as a court of equity, granting an injunction restraining the appellants from digging iron ore on certain lands in that county, and also from an order passed by the court of chancery, to which the cause was transferred, continuing the injunction until final hearing, and presents for our consideration the meaning and operation of the agreement of the 10th of December, 1838.

This contract, which appears to have been executed by Charlotte C. D. Owings and the appellee, is in these words:

"I hereby grant to Richard Green the privilege of digging and moving the ore on that part of my place joining Wilderson's and Price's, at twenty-five cents per ton, for the privilege of ground; leave also to build a house on said land, the workmanship to cost one hundred dollars, the materials to be got on my land, at said Green's expense."

The original bill, after reciting this contract, and alleging that the complainant had dug, under it, a considerable quantity of ore, and was arrested in his operations by an affliction which incapacitated him, till within about four months before the institution of the suit, and that during that period an arrangement was accomplished, through misrepresentation by Christopher Geiger, in behalf of himself and the other defendant, with Charlotte C. D. Owings, for a portion of the lands

covered by the contract of the 10th of December, 1838, of which Geiger had notice, and that the defendants were engaged in raising ore on this land, seeks a specific performance of the agreement, and prays that the defendants may be restrained from raising and removing the ore.

On the 27th of July, 1846, the complainant filed a supplemental bill, which contains a narration of the facts set forth in the orginal bill, without any material variation, but supplies an important omission in the first bill, by praying specifically for the writ of injunction. This bill was supported by the affidavit of the complainant, and a bond having been given, as required by the court, an injunction was ordered, on the 24th of July, 1846.

It is apparent, from an examination of these bills, that the object and purpose of the complainant was to obtain a specific performance of the agreement of the 10th of December, 1838, and the conservative power of the court was invoked only to protect the property; the object of the contract against the alleged wrongful acts of the defendants pending the contestation, and until his right to a specific execution of this contract, was finally determined. As the writ of injunction was granted as auxiliary to the principal relief sought for by the complainant, it follows that the order granting the injunction can not be maintained, unless the case presented by the bills is of that character which would authorize a court of equity, in the exercise of its extraordinary jurisdiction, to enforce the contract.

It is an acknowledged principle in the exercise of that branch of equity jurisprudence which respects the specific performance of contracts, that it is not a matter of right in the parties, but the application is addressed to the sound and reasonable discretion of the court; it is granted or withheld according to the circumstances of the case, and a court of equity must be satisfied that the contract sought to be enforced is fair and just and reasonable, and equal in all its parts, and founded on an adequate consideration, before the court will interpose with this extraordinary assistance.

In the case of *Seymour* v. *Delancey*, 6 Johns. Ch. 224, the chancellor of New York said:

"Is it the dictate of sound legal discretion that this agree-

ment should be specifically carried into execution by the authority of this court? It is an application to sound discretion. This has been the uniform language of the courts of equity. It is not a case requiring the aid of the court, *ex debito justitiæ*. It is a settled principle, that a specific performance of a contract is not a matter of course, but rests entirely in the discretion of the court, upon a view of all the circumstances."

In defining the power and duty of a court of equity in the exercise of this portion of its jurisdiction the lord chancellor, in the case of *Radcliffe* v. *Warrington*, 12 Vesey, 331, announced:

"That the question was, not what the court must do, but what it may do, under circumstances, either exercising the jurisdiction by granting the specific performance, or abstaining from it."

In *German* v. *Machin*, 6 Paige, 292, the court determined. "That to entitle a party to a specific performance, the agreement which is sought to be enforced must not only be certain in its terms, but there must be mutuality in its character."

In *Boucher* v. *Vanbuskirk*, 2 A. K. Marsh. 346, the court said: "That the general rule is well settled, that to enable either party to compel a specific execution, the contract must be mutually binding on each."

In *Moore* v. *Fitz Randolph*, 6 Leigh, 185, the court declared: "That the contract must be mutual, otherwise equity will not execute it; that is both parties must have, by the agreement, a right to compel a specific performance, according to the advantage which it might be supposed they were to derive from it."

The same doctrine is stated by Lord Redesdale in *Lawrenson* v. *Butler*, 1 Sch. & Lef. 18, where he says:

"I have no conception that a court of equity ought to decree a specific performance in a case,* except where both parties had, by the agreement, a right to compel a specific performance, according to the advantage which they might be supposed to have derived from it; because, otherwise, it would

* In Lord Redesdale's opinion, the words "where nothing has been done in pursuance of the agreement," follow the asterisk.

follow that the court would decree a specific performance, where the party called upon to perform might be in this situation, that if the agreement was disadvantageous to him, he would be liable to the performance, and yet if advantageous to him, he could not compel a performance." "This," he says, "is not equity."

The same principle is affirmed in the case of *Bromley* v. *Jefferies*, 2 Vernon, 415, and it is now established that, unless there is to be found in the contract this essential ingredient of mutuality, a court of equity will not compel its specific execution.

This constitutes an insuperable objection to the specific performance of the agreement under consideration. It is true that as this mine was worked and ore raised from it by the appellee, an obligation to pay twenty-five cents for every ton that was produced would be created. But the contract grants to the appellee the mere privilege of digging ore, and is not compulsory in its character; a privilege to be exercised or not at his pleasure, imposing no corresponding obligations; and if the appellee considered the agreement into which he had entered injurious, and refused to work the mine, it is apparent from every part of this paper that the proprietor possessed no power to enforce, in a court of equity, an observance of the contract. The practical operation of an agreement of this description is that while the appellee may use the mine if he finds it productive, he may refuse to do so upon discovering that his purchase is disadvantageous, and the owner of the property would be deprived for years of the revenue which, under other circumstances, might be derived from it.

A contract so unequal in its stipulations and bearing, which binds one party while it leaves the other unfettered, as it respects the observance of its terms in which there are to be seen no mutual or reciprocal engagements, and which must be regarded therefore as unreasonable and inequitable, can never be enforced by a court of equity.

As it is perfectly clear that the contract which forms the subject of the present suit could not be enforced in equity and that the court would have dismissed the bills at the final hearing, there could be no ground for granting an injunction,

the object of which was to protect the property pending the controversy in reference to the specific execution of the agreement. We think, therefore, that the county court erred in granting the injunction, and that for the reasons already assigned the chancellor was in error in continuing it.

Various questions were raised by the answers of the defendants and discussed by the counsel in the progress of the argument, in reference to which it has become unnecessary to express an opinion, as we think that the case presented by the bill did not entitle the complainant to the interposition of a court of equity.

The order of Baltimore County Court as a court of equity, granting the injunction, and the order of the chancellor continuing it, are reversed with costs, and a decree will be signed reversing these orders and dismissing the bills of complaint.

Orders reversed and injunction dissolved, and bill dismissed.

PRICE v. GRIFFITH.

(1 De Gex, M. & G. 80. High Court of Chancery, 1851.)

Indefinite contract—Decree for lease of moiety of a colliery against a single co-tenant, refused. One of two tenants in common of lands containing mines, entered into a negotiation for a lease of minerals, and wrote a letter, stating his willingness to grant a lease on the terms of a paper referred to in the letter. There were two papers, each of which in some respects answered the description in the letter. One of these purported to be terms for letting and taking coals, "etc.," under the lands in question, but contained no more definite description of the minerals, which were the subject of it. In a suit by the proposed lessee for specific performance as to the moiety belonging to the tenant in common, who had written the letter: *Held*, 1. That the paper to which the letter referred was not sufficiently identified. 2. That even if it was shown to be the above paper, its terms were too indefinite to be enforced specifically. 3. That the contract being for a lease of the entirety, and the defendant not having been shown to have made any misrepresentation as to his title or otherwise, it could not be enforced against him as to one moiety only.

This was a specific performance suit instituted by the

assignee of the benefit of an agreement, entered into between two of the defendants.

The defendant Thomas Digby Aubrey Griffith, and his aunt, Mary Jenkins, were seized in fee as tenants in common of lands at Llettai-Brongie and Gelli Eblig in Glamorganshire, containing seams of coal and iron stone. In 1843, David Rees, another of the defendants, entered into a negotiation with the defendant Griffith for a lease, the terms of which were in question. In the course of this negotiation the defendant Griffith wrote to the defendant Rees a letter as follows:

"As to the coal at Llettai-Brongie, I beg to say that I am still of the same mind as to the letting and to you as the lessee on the terms we advanced, and which we both coincided in, which terms are stated on the agreement in Mr. Cuthbertson's hands, and the term to commence from May next."

The plaintiff alleged that the agreement referred to in this letter was a document in the following terms:

"Terms proposed by Mr. David Rees for letting and taking of coals, etc., at Llettai-Brongie and Gelli Eblig. Lessors to grant term of ninety-nine years. Term to commence from 1st May, 1843. If worked as a country colliery, without a road, rent to be £20 per annum. If used for exportation or manufactories, or, if sold to manufactories, rent to be £100 per annum, with stated royalty. Royalty to be 6*d.* per ton on all minerals. If minerals from other lands than the said farms be carried over the said farms, rent to be £100 per annum, whether the minerals on the said farms be worked or not.

"Lessors to grant all right of waters appurtenant to the said farms, and not being to the detriment of the said farms, to the lessees as far as lessors' right extends.

"Lessors to have the power of discontinuing said lease by twelve months' notice, such notice to commence and be given on the first day of some May ensuing. Rents to be paid every three months, by even and equal quarterly payments.

"The road for the working and conveyance of the said minerals, or minerals on other lands as before mentioned, to be completed within the period of three years commencing from the date of these presents; and if the said road be not completed within that space of time, that nevertheless the said rent of £100 be paid.

"That lessees shall supply lessors and all tenants of lessors on the site of working, with coal for their purposes, and the purposes of the land they shall hold of the said lessors, free of all expense, save and except the expense of working the said coal.

"That lessees shall pay lessors after the rate of ten years' rent, valued upon the clear land of the said farms, for all land they shall use in making the said road from and at the time of the commencing of the said road; and that the lessors shall, for the purpose of making such estimate, produce a plan, pointing out the line of road they, the said lessees, intend making over the said land, previous to the commencement thereof.

"That lessees shall pay lessors for all timber and bark on such timber they shall cut, fell, or destroy, in laying down any roads, etc., at market price.

"Lessees to erect weighing machine, and lessors to be at liberty to examine books to ascertain quantity worked."

The plaintiff, Sir Robert Price, insisted that these documents constituted an agreement, to the benefit of which he claimed to be entitled under the defendant David Rees, and he instituted the present suit to enforce a specific performance against Miss Jenkins as well as against Mr. Griffith, or, in the alternative, against the latter as to his moiety. The bill had been dismissed by consent as against Miss Jenkins, the plaintiff being unable to prove her concurrence in the proposal.

The defendant Griffith, by his answer, stated in effect (among other things) that the document referred to was not that above set out, but another; and that the negotiation never arrived at the point of becoming a definite agreement.

The case was heard before Vice Chancellor Wigram, who dismissed the bill with costs; and it now came on to be heard upon an appeal from this decision.

Mr. ROLT and Mr. HISLOP CLARKE, for the appellant.

Mr. MALINS and Mr. J. H. PALMER, for the respondent.

The Lord Justice KNIGHT BRUCE.

The first question is whether the documents A and C taken together, constitute a perfect agreement capable of being enforced by a decree for specific performance. To the affirmative of that proposition there are several objections. In the first place I am not satisfied, speaking for myself alone, that the subject-matter of the contract is sufficiently stated. I am not satisfied what was intended by the term "coals, etc." What did this "etc." include? In the next place, I am not satisfied that the other terms of the alleged agreement are completely intelligible, or such as can be carried into execution.

But, assuming that the papers A and C comprise all necessary for constituting a binding contract, the question remains whether they have been shown to have been acceded to, inasmuch as the paper A was not signed, but only proposed to David Rees as the conditions upon which the coal mines were to be let. The plaintiff has endeavored to overcome the difficulty arising from the absence of a signed agreement by producing the letter marked C, and he alleges that the agreement referred to in the letter was the document marked A. There were, however, two papers (A and Z) in Mr. Cuthbertson's office, each of which may with equal propriety, if with propriety at all, answer the description in that letter. It is, therefore, unnecessary further to investigate the meaning of the paper marked A, since it is not shown to be the document referred to as "the agreement in Mr. Cuthbertson's hands."

It is also unnecessary to consider the question arising under the Statute of Frauds.

But this is not the whole case against the plaintiff. The colliery belonged to two persons in undivided moieties. The plaintiff filed his bill against them both, alleging that the contract was binding upon both; but by an alternative prayer, he prayed relief against one if he should fail to establish his claim against the two. The bill was afterward dismissed against Mary Jenkins, leaving only the owner of the other share. But the owner of the other share never meant to contract for one share alone. If he intended to contract at all, he intended to contract for a lease of the whole colliery. Cases may be conceived where a person who has contracted to convey more than it is in his power to convey, ought to be decreed

to convey what he can, either with or without compensation to the vendee for such part of the subject-matter of the contract as the vendor is unable to convey. But a lease of an undivided moiety of a colliery is a very different thing from a lease of a whole colliery; and in this case there is no evidence of improper conduct, or misrepresentation, or of the defendant Griffith having held himself out as capable of contracting for the whole, or, in fact, any other circumstance constituting a ground for a decree as to one undivided share alone.

With regard to costs, the plaintiff complains that a defendant, who ought never to have been brought before the court at all, has set up more than one defense. But there is no reason here for dividing or giving less than the whole costs.

The Lord Justice LORD CRANWORTH.

I am of the same opinion. The vice chancellor seems to have gone on the ground that there was no agreement capable of being enforced. The agreement relied on is, in two respects, deficient. I am not satisfied what that paper was which was referred to in the letter of the 15th April, 1843, as "the agreement in Mr. Cuthbertson's hands," and if the document A be that paper, I am of opinion that the terms of it are too ambiguous for the court to carry into effect.

The appeal must be dismissed with costs.

POLLARD v. CLAYTON.

(1 Kay and Johnson, 462. High Court of Chancery, 1855.)

[1] **Laches in enforcing coal contract—Construction.** Bill by an iron manufacturing company, against proprietors of coal mines adjoining their works, for specific performance of an agreement to sell to the company, at a fixed price per ton, all of certain beds of coal, estimated to contain from 120,000 to 150,000 tons, to be raised and delivered by defendants at the rate of 500 tons per week, and the company to drain the beds; and for injunction to restrain defendants from selling any

[1] *Clegg* v. *Edmondson*, 8 M. R. 180; *Ernest* v. *Vivian*, Id. 205; *Pratt* v. *California M. Co.*, 24 Fed. 869.

part to other persons. The bill averred that the coal was very conveniently situated with reference to the company's iron works, which adjoined thereto, and that the company had the power, by means of their engines and pits, to drain the beds, and had occasion for a large quantity of coal of that particular description. Demurrer allowed. 1. Because not practicable for the court to supervise such a contract. 2. On account of *laches* in delay of eleven months after performance refused, the contract having reference to a commodity of fluctuating value as to which unusual vigilance is expected from parties seeking specific performance.

[1] **Supervision of working by court—Special value of particular coal mine to particular iron works.** Leave to amend and to account for the *laches* refused on the ground that a court of equity could not interfere to see to the execution of a contract of that character, due in installments and requiring peculiar supervision, and the benefit to be derived from the particular location of the beds relative to the iron-works, not being, of itself, sufficient ground for specific performance.

A contract to sell all the coal of certain beds to certain works, is not one of monopoly or against public policy from the fact that it involves, by implication, a covenant not to sell to other parties.

Leave to amend a hopeless bill, will not be given.

The bill filed on the 20th of February, 1855, by one of the managers of the Bowling Iron Company, suing as such on behalf of the company by virtue of powers in the Companies Act, stated that the company was a joint stock company established at Bowling, in the parish of Bradford, in Yorkshire, for the purpose of getting, purchasing and selling iron ore, iron-stone and iron and steel, and of smelting, manufacturing and vending cast-iron and steel, and also of getting, purchasing, converting and selling coal and other mineral produce, and had carried on that business since 1848; that the defendants, who carried on the business of ironmasters and manufacturers of iron at Bierley, in Yorkshire, were, at the date of the contract of which the bill sought specific performance, and had ever since been, possessed of certain mines or beds of coal called Better Bed coal, adjoining or near to the company's iron works and collieries; that in 1849 the defendants, not requiring for the working of their own iron furnaces such portion of the Better Bed coal as was situate in North Bierley, and which was estimated to contain from 120,000 to 150,000 tons, opened a negotiation with the company for the sale thereof

[1] *South Wales R'y* v. *Wythes*, 1 Kay & J. 186; *Booth* v. *Pollard*, 13 M. R. 322.

to them at a fixed price per ton, to be paid at such times and in such manner as might be agreed upon; that the Better Bed coal in North Bierley was very conveniently situate with reference to the company's collieries and iron works, which adjoined thereto, and the company had the power, by means of their engines and pits in their collieries, to drain or "loose," as it is technically termed, the beds of Better Bed coal in North Bierley, and the company having occasion for a large quantity of coal of that particular description for their iron works, the plaintiff, as their manager, went over the lands in North Bierley, under which the Better Bed coal was lying, ascertained its quantity, quality and exact position with reference to the company's works and collieries, and estimated the expense of laying down tramways for conveying it to the company's works; and after some negotiation, the defendants, in January, 1850, agreed to sell to the company, and the company agreed to purchase of the defendants, all the clean Better Bed coal in North Bierley, unriddled, at 6*s.* 6*d.* per ton of 20 cwt., to be raised and delivered by the defendants at the rate of 500 tons per week into wagons to be furnished by the company at the different pits, with a credit of twelve months on each month's delivery, but to be paid for in cash on the 1st of the succeeding month in the following year; that the company then laid down tramways from their iron works to the defendants' beds of coal in North Bierley, and provided the wagons, horses and other things necessary for conveying it from North Bierley to the company's iron works, and thereby incurred very considerable expense upon the faith of the agreement, and with the knowledge of the defendants; and the defendants, in pursuance and part performance of the agreement on their part, began to deliver to the company the aforesaid coal at the rate of 500 tons per week, and continued such delivery upon and according to the terms of the agreement thenceforth until February, 1854, and during that period the company, at the expiration of the period of credit to which they were entitled under the agreement, from time to time paid the defendants for each month's delivery, according to the same agreement; that in December, 1852, the company were informed by the defendants that the coal workings from which they supplied the company with coal were so near being finished that they would

not be able to furnish the company with the quantity they were then doing without a fresh "loose," and after some negotiation on the subject, it was agreed in April, 1853, that the company should drain or "loose" the defendants' Better Bed coal in North Bierley, which remained unworked and ungotten, by means of the company's engine and pits in their adjoining collieries in Hunsworth; and that the defendants should pay to the company the yearly sum of £300 during such time as the company should work such engine, and the yearly sum of £150 during such time as the defendants should work it after it should be abandoned by the company; and that the defendants should also give up the engine and plant in good tenantable repair; and the defendants further agreed that they would recommence working an engine on their collieries in case their workings should throw additional water upon the mines and works of the company, and to continue such working so long as the same should be required, and that they should do so if required by the company before the company commenced hollowing a pit for the defendants, in case it should be required. That the company had always been and were still ready to perform these agreements if the defendants would perform them on their part, which they refused to do; that the defendants continued to deliver the coal in pursuance of the agreement of January, 1850, until October, 1853, but in that month they discontinued such delivery, alleging that the pit from which they were supplying such coal was worked out; but they represented to the company that the stoppage was only temporary, and that the delivery of the agreed quantity would speedily be resumed; that on the 4th of March, 1854, the plaintiff being informed (as the fact was) that the defendants had not delivered any coal to the company since February, 1854, but that they were nevertheless laying up and stacking Better Bed coal which they had got in North Bierley, and which they had sold to the company, immediately wrote to the defendants as follows: "The writer has only this moment heard that you have ceased to send in coal to this company according to your agreement. He was aware that a stoppage had taken place (as he believed temporarily, and owing to the working

out of a pit from which you were supplying us), but he now learns that you are laying coal up, and still refuse to send us it in. Pray be so good as to explain to us upon what ground you refuse to fulfill your agreement;" that the defendants had, in fact, between February, 1854, and March, 1854, raised and got a large quantity of the clean Better Bed coal in North Bierley so sold to the company, but instead of delivering the same to the company pursuant to their agreement, sold part to other persons, used other part, and laid up and stacked the remainder on their own lands as a store for future use; that at that time the defendants had delivered to the company under their agreement only 72,715 tons of coal and there still remained in North Bierley upward of 77,000 tons, which the defendants might have got raised and delivered; and that neither such coal nor the coal which the defendants had stacked and laid up since February, 1854, was required by them for the working of their furnaces, and even if it had been so required, the defendants were not entitled under the agreement to retain it for such purpose, or for any purpose, they having agreed to sell to the company the whole of the clean Better Bed coal in North Bierley.

The bill then stated a correspondence which ensued between the parties, terminating with the following letter from the company to the defendants, dated March 20, 1854: "We will thank you to say by return of post, or at your earliest convenience, whether, in the event of our giving you the loose from our boundary, which has been the subject of negotiations between us and Lord Scarborough, you will supply us with the coal which will be thereby set at liberty. In the event of your answer being in the negative, we will thank you to give us the address of your solicitors, who may accept service of process on your behalf." To which the defendants on the following day replied as follows: "We have no wish to repudiate. Our solicitors are Messrs. Bentley & Wood, by whom we shall be advised in any further negotiations."

The bill further stated that the company afterward repeatedly requested the defendants to complete the performance of their contract, and to deliver the remainder of the Better Bed coal, and repeatedly offered to drain or loose such of the

unworked beds as the defendants might require to have drained or loosed upon the terms of the agreement of April, 1853, but the defendants had hitherto refused and still refused to comply.

The bill charged that the defendants were possessed of Better Bed coal at Okenshaw and other places in Yorkshire, besides North Bierley, much more than sufficient for the purpose of working their furnaces, and some of which were being worked at the commencement of the negotiation with the company; that the defendants had not at any time since February, 1854, required and did not then require the Better Bed coal in North Bierley for working their own furnaces; and that since February, 1854, they had raised and then had in their possession, stacked or laid up, a large quantity of clean Better Bed coal in North Bierley which they ought to have delivered to the company; and it further charged that damages at law would not be an adequate compensation to the company for the breach by the defendants of the agreement for the sale of the coal.

The bill prayed that the defendants might be decreed specifically to perform the agreement to sell and deliver to the company all the clean Better Bed coal in North Bierley at the rate of 500 tons per week, upon the terms of the agreement of January, 1850, the plaintiffs offering to perform the same agreement so far as it remained to be performed on their part and to drain or loose by means of their engine and pits, and upon the terms of the agreement of April, 1853, such of the beds as had not yet been raised or gotten by the defendants; that an account might be taken of all the clean Better Bed coal in North Bierley, which, since January, 1850, had been sold by the defendants to any person other than the company, and that the defendants might be decreed to account to the plaintiff for the surplus proceeds of such sales over and above the price which would have been payable to the defendants by the company for the same under the agreement between them; and that the defendants might be restrained from using, for the purpose of working their furnaces or otherwise, and from selling or disposing of to any person other than the company, any part of the clean Better Bed coal already stacked or laid up by them, or in their possession and power,

or which might at any time thereafter be got or raised from their beds of coal in North Bierley.

The defendants demurred to the bill for want of equity.

CHANDLESS, Q. C., and COLE, in support of the demurrer.

SPEED, in support of the bill.

THE VICE CHANCELLOR.

This demurrer must be allowed. Mr. Speed has argued it extremely well, and extremely fairly. He has not rested it on the minor question, which I thought might possibly be raised, namely, whether a negative contract was not involved, so as to disable the defendants from supplying other persons with coal, they having contracted to sell the whole to the plaintiff. He has exercised a very proper discretion as counsel, in not pressing that point. I do not think it could have been sustained, the contract here being a substantial contract, not a mere negative contract, designed to prevent the defendants from dealing with other parties to the prejudice of one, who wishes to exercise a monopoly. The bill simply avers a contract for the sale of all the coal.

Independently of the difficulty arising from the nature of the contract itself, there is in this case, on the ground of delay alone, so serious an objection, that it would be impossible for the court to perform the contract. Before noticing, however, the effect of that delay, I must first make some observations upon the nature of the contract itself.

Having examined *Buxton* v. *Lister*,[1] and the very remarkable case, there cited in argument, of *Taylor* v. *Neville*,[2] where the agreement was for the supply of iron by installments, it seems to me that this case would not reach so high as Lord Hardwicke represents the effect of the contract in *Buxton* v. *Lister*,[3] namely, that the benefit to be derived, being a benefit to be derived from successive deliveries of goods, and successive payments at different periods, would be one which could not be adequately estimated in damages at law, where, the action being brought at a given period, the jury are obliged to estimate conjecturally and by guess (as would have been the case in *Adderley* v. *Dixon*), the loss the plaintiff will sus-

[1] 3 Atk. 383. [2] Cited 3 Atk. 384. [3] 1 S. & S. 607.

tain. And Lord Hardwicke admits that all these cases require to be closely and narrowly watched; and seems to feel the difficulty which a court of equity is under in performing a contract for the mere sale of chattels. Of *Taylor* v. *Neville* no more is stated than this, that there was an absolute contract to supply so much iron for so many years at a given price. There, of course, it would be competent for the defendant to supply the iron, for he would have it, either in his own possession or by buying it in the market, and would supply it from time to time to the plaintiff according to the terms of the contract. In that case, therefore, there would be no very great difficulty, and the court would enforce the payment by the plaintiff of the price of the iron, according to the terms of his agreement. But in this case there is much more to be done. It is said, that, as regards the defendants, this is an easier contract than that in *Taylor* v. *Neville*, and, possibly, these defendants may have it more in their power, in one sense, to perform their part of the agreement, they having beds of coal already in their possession; but what the court must look to is the degree of facility it has of seeing its decrees enforced; and the question here is, not whether the defendants are to be compelled to buy a certain quantity of any coal in the market and deliver it according to the agreement, but whether they are bound to work and supply coal; part of the plaintiff's case is, that no coal but this will suit him; this, and no other coal, is the coal he must have. It is not the mere case, therefore, of the defendants being able to get the coal anywhere, as the defendant in *Taylor* v. *Neville* might the iron, and deliver it at given periods: with the exception of a portion which is stacked (to which I shall refer presently), these defendants have not got the coal. But if the agreement is to be enforced, it must, of course, be enforced *in toto* for the whole period, for the defendants as well as for the plaintiff. Now, besides the agreement of January, 1850, by which the defendants agree to work, raise, and deliver the coal, there is also the supplemental agreement of April, 1853, intered into (whether gratuitously or not, it is immaterial now to inquire) by the plaintiff, by which the plaintiff is to drain the works. The defendants seem to have thought it proper that the plaintiff should enter into that agreement;

and the plaintiff has agreed and offers to perform it. I should, therefore, have to make a decree on the one hand that the defendants continue the working of their colliery, involving the employment of their capital and men, and all the other operations necessary in order to raise 500 tons per week; and on the other hand, that the plaintiff continue the draining of the work, so as to enable these 500 tons per week to be raised. I can scarcely conceive a contract more difficult to be executed through the medium of a court of equity, or one in which more incessant applications must necessarily be made, to know whether, on the one hand, the defendants are putting their best strength forward in order to raise, with a given number of workmen, at a given rate of wages, the stipulated quantity of 500 tons per week; and whether, on the other hand, the plaintiff is performing his contract with full effect, in draining sufficiently and adequately the works which are in operation.

Independently of the serious difficulty in this respect, I can not help further making the observation that notwithstanding the case of *Taylor* v. *Neville* and the approbation it met with from Lord Hardwicke in *Buxton* v. *Lister*, it seems to me somewhat singular, looking to the large mercantile community of this country, that we do not find in the books since the case of *Taylor* v. *Neville* (a case not in Peere Williams, not reported at all, and apparently only cited from manuscript), a single case of a bill for the performance of any contract for the mere supply of goods, cotton, wool or the like, on the ground of their being supplied by installments; no such case can be produced at any late period, and with the exception of *Buxton* v. *Lister*, the only case in which the doctrine as to a delivery by installments has been recognized is that of *Adderley* v. *Dixon*, a totally different case, where the agreement was for the purchase of the unascertained dividends which might become payable from a bankrupt's estate, and specific performance was decreed at the suit of the vendor—the court holding that the purchaser as plaintiff had a right to the specific thing he bought and ought not to be sent to a court of law to try what damages he had sustained.

Another ground is also referred to by Lord Hardwicke in *Buxton* v. *Lister*. He supposes the case of a shipwright

purchasing a quantity of timber because from its vicinity it was peculiarly convenient for the building of his ship; and in reference to the case supposed by Lord Hardwicke, it has been argued that in the case before me I must look to the averment of the bill that the plaintiff wanted the coal for the manufacture of his iron and could not get any other coal convenient for the working. The bill does not allege anything more; it does not aver that the defendants' coal was more peculiarly calculated for the working of the plaintiff's iron than other coal in the neighborhood, but simply the fact of its being nearer. Now, in the case put by Lord Hardwicke, time must have entered most materially into the contract. The shipwright might be under a contract to build a ship by a given time, and therefore it might be an object of great importance to him to have the wood supplied from the immediate neighborhood, that he might get it without trouble and so be enabled to complete the contract within the given time. But here there is nothing to lead one to suppose that, with all the collieries in the neighborhood of Bradford, the plaintiff can not procure coal as rapidly as he pleases from some other colliery, not possibly quite so rapidly as from that of the defendants, which happens to lie next door; but I can not treat that circumstance as material. If it is to be laid down as a governing rule that in every case like the present specific performance will be decreed or refused according as the coal does or does not lie next door to the plaintiff, it will follow that where a maltster happens to live next door to a brewer, and could send his malt by a shoot down into the brewer's premises, a bill would lie for the specific performance of an agreement for the delivery of certain quantities of malt by that particular maltster to save the brewer the trouble of having to go and buy it at a distance of a quarter of a mile. The reference to the supposed case of the shipwright was doubtless made by Lord Hardwicke as being applicable in case the shipwright were under a contract to complete his work within a particular time. Here there is nothing of that kind averred. It is averred that the defendants' coal is more convenient, probably apart from the price which the parties agreed to pay; but I apprehend that all considerations of that description could be estimated by damages.

The question of installments could not be so easily estimated

by damages; and upon that question, looking into the authorities to which I have already adverted, I might have pau ed; although I should still have felt the extraordinary and enormous inconvenience of this court having to superintend the performance of such a contract as the present. But here, I have the further circumstance of the delay on the part of the plaintiff in seeking the relief prayed by his bill. Surely, even if this contract were one which this court ought specifically to perform, still, being a contract for the purchase of a commodity which, as I may take judicial cognizance, varies in price from week to week, the delay which has occurred since the plaintiff became aware of the failure of the defendants to perform their part of the contract, is at once an answer to a bill for specific performance. Eleven months ago, the defendants tell the company they must take their own course. The company are aware of the breach of contract as early as the 4th of March, 1854. This is clear, for in their letter of that date they complain that the defendants are laying up coal, and refusing to send it in to the company. Besides, the bill expressly avers, that, on the 4th of March, the plaintiff was "informed (as the fact was) that the defendants had not delivered any coal to the company since February, 1854, but that they were nevertheless laying up and stacking what they had sold and ought to have delivered to the company." There is, also, an averment that the defendants had, in fact, between February and March, raised and got a large quantity of coal, and instead of delivering it were selling part of it to other persons, using other part of it and laying up and stacking the remainder. Then follows the correspondence of the 20th and 21st of March, 1854. (His Honor read the letters of these dates, and proceeded.) It is said, and it is truly said, that the latter of these letters, in which the defendants say they have no wish to repudiate, and name their solicitors, is not a distinct and positive throwing up of the contract. But, although that may be so, thus much is clear: the company, after writing to complain that coal had been stacked up, and other coal supplied to other parties in breach of the agreement, are told in reply, as long since as March, 1854, the names of the defendants' solicitors, although the defendants say they do not want to repudiate their contract; and the next averment is, that the company have

repeatedly applied to and requested the defendants to perform their contract, and the defendants have as often refused. Under that state of circumstances, although, it is true, the defendants can not be heard to say, "you were only entitled to have this coal delivered at the rate of 500 tons a week, in consecutive weeks, and therefore can not have it at any longer intervals of time," if they, by their own wrong, have prevented the plaintiff's having it weekly, in breach of the agreement, yet they are entitled to say, "if you allow a gap where the contract says that 500 tons weekly are to be delivered, it is, at least, incumbent upon you, the commodity being one so variable in price as coals, the moment you find any neglect, or delay, or hesitation on our part to perform the agreement, still more when we refer you to our solicitors (which is the usual way of bringing these matters to an issue,) to file your bill at once, if you mean to file one at all, to have the benefit of that agreement." Instead of that, the plaintiff waits eleven months, and then, at last, the bill is filed. I do not look out of the bill, as the case made has not done so; but it is enough for me to say that coal, like all other articles of constant use and constant sale, is a commodity fluctuating from day to day in its market price; and during the interval which has elapsed there may have been every possible variety of price, of rise or decline, and the parties are not now in the same position. Those who seek specific performance of contracts relating to such commodities must be unusually vigilant and active in asserting their rights. It is not equitable, and in this court especially, it would be improper to give relief of that description, after such a period of delay as in this case has been allowed to occur between the time when the plaintiff was first in a position to file a bill, and the time when he took upon himself to file it.

Having regard to the circumstance of delay alone, the court ought not to give relief after *laches* of this description.

I must, therefore, allow the demurrer.

Mr. SPEED now applied for leave to amend, and account for the delay which had occurred. He was informed that a long correspondence had taken place between the parties. If he should find that the delay was accounted for, by a correspondence extending continuously from the 21st of March, 1854, to

the filing of the bill, the case would be removed from the ground upon which the court seemed mainly to have allowed the demurrer.

THE VICE-CHANCELLOR.—As to the ground upon which I have mainly determined this case, I can not say I encourage any amendment to this bill. Although I am bound to admit that the cases you have cited go further toward supporting your argument than I had expected, especially the case of *Taylor* v. *Neville*, which I had not in my recollection, I think there would still remain such insuperable difficulty in the execution of this contract, in making the defendants work and raise the coal, and making the plaintiff drain the mine, that on that ground (had I been compelled to rest it upon that ground) I should have allowed the demurrer. I should not be doing you any service by allowing you to amend.

Leave to amend refused.

MACBRYDE v. WEEKS.

(22 Beavan, 533. The Rolls Court, 1856.)

Vendor must furnish abstract of title. A agreed to grant a lease to B. After considerable delay on the part of A, B gave A notice that unless he completed within a month, he would rescind the contract. The day before the expiration of the time thus limited, A forwarded to B the drafts, but he furnished no abstract nor showed that he was in a situation to complete. B rescinded the contract: *Held*, that it was effectual, and the court dismissed A's bill for specific performance with costs.

[1] **Time of the essence of mining contracts.** In contracts for the lease of working mines, time, though not named, is, from the fluctuating nature of the property, considered as of the essence of the contract, and the intended lessee may therefore fix a reasonable time for completion, and on the lessor's default, may rescind the contract.

Rescission of contract for mining lease on account of lessor's delay. A, on the 4th of October, contracted to grant a mining lease to B, but no time was mentioned for completion. On the 10th of December, B gave notice to A that unless he completed the contract within a month he would rescind the contract: *Held*, on A's default, that B was justified in giving the notice, that the time was reasonable, and a bill by A for specific performance was dismissed with costs, although there

[1] *Settle* v. *Winters*, 10 Pac. 216.

were matters essential for the completion which did not depend on A, but on third parties.

Waiver of right to rescind on account of misrepresentations. A purchaser of coal lands offering to perform his part of the contract, required, by notice, the vendor to complete within a month: *Held*, that the purchaser could not afterward set up as a defense to a suit for specific performance, misrepresentation by the vendor, of which he was aware at the time of giving the notice.

This was a suit for the specific performance of an agreement for a lease of a certain mining property. It was resisted, first, on the ground of misrepresentation; and secondly, that the defendant, after due notice, had rescinded the contract. The agreement between the plaintiff and defendant, dated 4th October, 1855, provided as follows:

"1st. Mr. Macbryde agrees to grant a lease of his present freehold of about five and a half acres of mineral land, situate" etc.," for twenty-one years to Mr. Weeks, renewable at the end of that time, if desired by Mr. Weeks.

"2d. Mr. Macbryde also agrees to purchase the adjoining field of about four acres, now belonging to Mr. Strongitharm and to grant a similar lease of it to Mr. Weeks.

"3d. Mr. Macbryde further agrees to procure the assignment of the lease of about twelve acres of mineral land now held by his brother, James Macbryde, from Mr. Neville to Mr. Weeks.

"4th. Mr. Macbryde also agrees to sell to Mr. Weeks the whole of the plant, engines, shafts, tools, brick-kilns, offices, weighing machines etc., on the joint estates.

"5th. Mr. Macbryde will exercise all his influence to procure an extension of Mr. Neville's lease to twenty-one years, and to obtain a modification of the final leveling clause in that lease.

"Next, Mr. Weeks agrees to pay £1,500 for the lease of the twelve acres from Mr. Neville, the lease of the nine and a half acres from Mr. Macbryde, the engines, plant, brick-kilns, buildings, etc., etc., in the following manner:" It then provided for the payment by installments, the first to be paid "on being put in possession legally."

The agreement then went on to specify the royalties in minerals and surface rent, which were to be paid by Mr. Weeks.

The plaintiff proceeded to purchase the field mentioned in the second clause, and on the 5th November, 1855, Mr. Strongitharm (the owner of the field) agreed to sell it to the plaintiff for £560. On the 12th of that month a meeting took place between the plaintiff and Mr. Neville in the presence of the defendant, when Mr. Neville, in consideration of £200, gave his consent in writing to the assignment to the plaintiff of the lease mentioned in the third clause, or to the defendant as his nominee. Such lease contained a restriction against any assignment thereof by the lessee without the written consent of the lessor. The plaintiff thereupon gave Mr. Neville two promissory notes of £100 each, in payment of the £200. Mr. Neville, however, refused to extend the term granted by the lease, or to allow any modification of the clause referred to as "the leveling clause," and which required the lessee to level the land demised at the expiration of the term.

The plaintiff alleged that he was, at the date of the agreement, seized in fee simple in possession of the land mentioned in the first clause, subject to a mortgage, and it was thought desirable that a transfer of this mortgage should be effected previously to the completion of the agreement; that he proceeded to endeavor to effect such transfer, and that he was in other respects occupied in placing himself in a position to carry the said agreement into effect, when, on the 10th December, 1855, he received the following notice from the defendant:

"I hereby require you to perform and complete, within one calendar month from the day of the date hereof, your part of the agreement in writing entered into by you with me, bearing date the 4th of October last, and signed by you; and I hereby offer to perform my part of the said agreement within the time aforesaid, on your performing your part thereof. And I hereby give you notice that in default of your performing your part of the said agreement, within the period aforesaid, I shall consider the said agreement at an end."

On the receipt of this notice the plaintiff's solicitors, by his direction, applied to Mr. Strongitharm for the abstract of his title to the field which the plaintiff had agreed to purchase.

Although two applications were made to him on the subject, such abstract was not forwarded by him till the 2d January, 1856, whereupon it was immediately examined, and the plaintiff's solicitors, finding the title satisfactory, prepared the draft of a conveyance of this field, and on the 7th they forwarded the draft to the solicitor of Mr. Strongitharm for his perusal. The plaintiff's solicitors also prepared the draft of an assignment to the defendant of the lease granted by Mr. Neville, and also the draft of a lease to the defendant of all the land to which the agreement related, including the field purchased by the plaintiff of Mr. Strongitharm. On the 9th January, 1856, they forwarded the last mentioned drafts to the defendant's solicitors.

The defendant's solicitors retained these drafts, but on the 12th January sent the following letter to the plaintiff's solicitors:

"*Dear Sirs:*—Mr. Macbryde not having performed his part of the agreement between himself and Mr. Weeks, of the 4th October last, within the time specified by the notice served by the latter on the former on the 10th December last, on behalf of our client, we rescind the contract and beg to return draft, lease and assignment."

On the 14th January the plaintiff's solicitors wrote to the defendant's solicitors denying their right to rescind the contract.

Mr. R. PALMER and Mr. KARSLAKE, for the plaintiff.

The defendant had no right to rescind the contract upon a month's notice. The performance of the agreement depended partly on the acts of two other persons, Mr. Strongitharm and Mr. Neville, neither of whom were bound by the agreement. The plaintiff used due diligence to enable him to perform the contract in that respect, but was unable to complete those acts within the one month limited by the notice. If the defendant's solicitors, instead of retaining the drafts forwarded to them, had returned them immediately, the plaintiff might have executed a lease and tendered it to the defendant within that time. At all events one month was not a reason-

able time. They cited *Witby* v. *Cottle*, Turn. & Russ. 78; *Seton* v. *Slade*, 7 Ves. 265; *Doloret* v. *Rothschild*, 1 Sim. & St. 590; *Parker* v. *Frith*, 1 Sim. & St. 199.

Mr. FOLLETT and Mr. SOUTHGATE, for the defendant.

The subject of the purchase was a lease, for a limited term, of a working colliery, and therefore immediate possession was of the essence of the contract. The defendant had a right to fix a reasonable time within which the plaintiff should complete, and in default to rescind, the contract; and here the time given by the notice to complete and put the defendant into legal possession, was ample. The plaintiff, not having complied with the requisitions of that notice, the contract was at an end. They relied on *Viscount Clermont* v. *Tasburgh*, 1 Ja. & W. 112; *Norway* v. *Rowe*, 19 Ves. 144; *Southcomb* v. *Bishop of Exeter*, 6 Hare, 213; *Parkin* v. *Thorold*, 2 Sim. N. S. 1; *Benson* v. *Lamb*, 9 Beav. 502, and *King* *Wilson*, 6 Beav. 124.

Mr. KARSLAKE, in reply, referred to *Guest* v. *Homfray*, 5 Ves. 818.

THE MASTER OF THE ROLLS.

This is a suit for specific performance.

The defense is two-fold. First, it is said that the plaintiff made inaccurate representations as to the value of the mine, on the faith of which the defendant entered into the contract; and, secondly, the defendant says that he has determined the contract by a notice given on the 10th of December, 1855, stating that unless the plaintiff performed his part of the contract within a month from that period, it was to be put an end to, and which he asserts was done.

On the first part of this case, I expressed my opinion at the hearing, that it failed: for, assuming the misrepresentations to have been made as the defendant alleges, still, after he had full information respecting that representation and the value, he gave the notice in question, in which he has undertaken to perform his part of the contract, in case the plaintiff performed his part within a month after notice. This, in my

opinion, is conclusive evidence that he did not, at that time, consider the misrepresentation to be material, and that notwithstanding it, he was willing to perform his part of the contract. After this, it appears to me to be impossible for the defendant to say, that the misrepresentations which he was then aware of, were so serious that it would be inequitable to compel him to perform his part of the contract. His notice pronounces judgment on his own objection, and in fact declares it to be untenable.

The other objection on which I reserved my judgment depends upon the question of time, whether, in the circumstances of this case, the notice of the 10th of December, 1855, was a reasonable one for the defendant to give, and if so, whether it has been complied with by the plaintiff or has been subsequently waived by the defendant. The contract was dated the 4th of October, 1855. (The master of the rolls here read it.) It is in favor of the plaintiff, that no time is mentioned for the completion of the contract; and also, that it imposes upon him several matters to be accomplished, which, in the ordinary affairs of mankind, take time, and the completion of which did not depend upon himself alone. It must be assumed that it was contemplated between the parties, that the plaintiff was to have a reasonable time to enable him to accomplish these objects. On the other hand, on the side of the defendant, it is to be observed, that the subject-matter of the contract was a lease for working mines, and above all, that more than half the land intended to be worked was held under a lease for less than twenty-one years, which was to be assigned, and which was rapidly running out. The absence from the contract of any specific mention of time within which it was to be completed, which would probably be conclusive against the defendant at law, I consider unimportant in equity. This, in my opinion, is one of those cases in which time was, from the nature of the property, necessarily of the essence of the contract, in this sense and to this extent, that it was incumbent on the owner to use his utmost diligence to complete his part of the contract, and that if he failed in so exerting himself, the defendant might decline having anything further to do with the matter. The subject of the contract was in part a lease for working a mine, which is a trade

of a fluctuating character, and obviously coming within the principles laid down in the cases cited of *Parker* v. *Frith*, 1 Sim. & S. 199, n.; *Wright* v. *Howard*, 1 Sim. & S. 190; *Coslake* v. *Till*, 1 Russ. 376; *Walker* v. *Jeffreys*, 1 Hare, 341, and several other cases. The rest of the property contracted for was not merely for the same purpose, but was a leasehold, having a short period to run, and therefore, from day to day, rapidly decreasing in value. In such a case, it is incumbent upon the vendor to use his utmost diligence to complete his part of the contract, although no time is specified in the contract; and in equity, the purchaser is at liberty to fix a time for the completion of the contract, by giving reasonable notice for that purpose. No doubt this would have no operation at law, the difference being very marked between law and equity, so far as regards this question, law only considering time as of the essence of the contract when it is expressly specified, whatever may be the condition of the parties and the property; but equity considering time essential in those cases only, in which injury would be inflicted upon one party by disregarding it.

With respect to that part of the contract which contemplates the plaintiff purchasing the adjoining field, and obtaining the consent of Mr. Neville to the assignment of the twelve acres, it is true, as I have observed, that a reasonable time is to be allowed to the plaintiff to effect these objects; but the time that is to be allowed for this purpose, is to be taken with this qualification—that the plaintiff, by entering into the contract, not only positively affirms that he can accomplish these objects, but he impliedly affirms that he will be able to accomplish them speedily; and he can not, in my opinion, afterward be allowed to urge as a sufficient excuse for a considerable delay, the fact that it was two or three months before he could induce the owner to sell the field in question, or that the purchase and the investigation of the vendor's title occupied several months. For the same reason he can not, in my opinion, urge as an excuse that a considerable time elapsed before he could induce Mr. Neville to agree to the terms upon which the lease should be assigned. Although he might, in this case, be permitted to show that unexpected obstacles occurred, and that he had used the utmost diligence to sur-

mount them, many cases, of which *Gee* v. *Pearse*, 2 De G. & Sm. 325, is an instance, affirm this principle—that the vendor must be taken to have the means of completing his part of the contract when he entered into it; in my opinion, the present contract is no exception to that rule, although it is a very peculiar one, and one of which, from its nature, it would have been almost impossible for the defendant to have enforced the specific performance against the plaintiff.

This, then, was the state of the parties when the contract was entered into; the subject-matter of it was such that it was of the greatest importance that it should be completed forthwith, and that the defendant should be put into possession of the subject of it without any delay; the plaintiff was under the obligation to use every species of exertion to accomplish this end, and if he could not do so within reasonable time, on being apprised of that fact, the defendant might abandon the contract.

In this state of things, I have looked at the evidence to see what has been done by the plaintiff, having regard to that which, as I have already stated, he was bound to do. The contract was on the 4th October, 1855. On the 5th November, the plaintiff entered into an agreement with the owner of the adjoining field to purchase it for £560. No explanation is given why this contract was not sooner made, and a month had then already elapsed. Up to the time when the notice was given by the defendant, I do not find that any further steps had been taken by the plaintiff relative to this property. It would appear, that no time for the completion of the contract was fixed; that the abstract was not delivered, and was not even applied for until the notice of the 10th of December. No communication whatever appears to have been made to the defendant or his solicitors, on the subject of the lease of the piece of land of which the plaintiff was the owner, under the contract.

With respect to the assignment of the lease from Mr. Neville, the delay up to this time appears to have been much the same as in the case of the purchase from Mr. Strongitharm. It does not appear when Mr. Neville was first applied to for his consent to the assignment of the lease; at all events, his consent was not obtained until the 12th Novem-

ber, 1855, on which occasion the defendant was present. Nothing further was done on the subject, and the correspondence shows that the defendant, if he did not strongly press, at least suggested to the plaintiff, the necessity of speedily settling the matter, and urged that, at all events, the lease from Mr. Neville might be assigned, if the rest of the matter stood over.

In this state of things, more than nine weeks having elapsed since the contract, and no communication having been made to the defendant to show when it was likely that it would be completed, he gave the notice on the 10th December, in which he says, if not completed within a month, "he should consider the agreement at an end."

What constitutes a reasonable notice and a reasonable time to be fixed in it, must depend upon the contract and the circumstances of each case. I think in those of the present case, having regard to the subject-matter of the contract, to the fact that more than two months had already elapsed, and that nothing appears to have been completed, so far as the defendant was concerned, no abstract of title delivered, no communication made or information given which looked like advancement (except that he was present on the 12th November, and knew that Mr. Neville had consented to the assignment of the lease), I think, under all these circumstances, that the defendant was justified in giving the notice in question, and that a month was not an unreasonable time to be fixed for this purpose.

Parker v. *Frith* was, in my opinion, a very different case. There, there was nothing in the subject-matter of the contract which required dispatch. The time originally limited in the contract had been mutually abandoned; the vendor had shown no want of diligence in making out his title, and in doing so he met with an unexpected obstacle in the withholding of a deed which he used his best exertions to obtain as speedily as possible. In that case also, on receiving the notice, the vendor disputed the right of the purchaser to give it and insisted throughout on the contract. Here, on the contrary, when the notice was received, no objection seems to have been taken, either to the right of the defendant to give it or to the time specified. This, it is true, does not vary the rights of the

parties, but as far as it goes it shows that the plaintiff took the same view of the construction of the contract he had entered into which I have expressed. What I have already stated of this case shows also how marked the difference is between it and *Parker* v. *Frith* in other respects. That case was never meant to decide that the parties to a contract are not bound to use due diligence for its completion, but it merely decides that the fact that a time was specified in the contract within which it was to be completed does not necessarily, in equity as it does at law, make time of the essence of the contract. Upon the facts in evidence of that cause, the want of due diligence could not, in my opinion, be imputed to the vendor; the facts in evidence in this case lead me to a contrary conclusion as regards the plaintiff.

Having come to the conclusion that the defendant was justified in giving the notice of the 10th December, the next question is, has the plaintiff complied with the requisition contained in that notice? In my opinion he has not. All that he did was, the day before the month expired, to send the defendant's solicitor a draft of the lease of two plots of ground, and also of the proposed assignment of the lease from Mr. Neville. It is true that the plaintiff had, in the meantime, satisfied himself that Mr. Strongitharm could make out a good title to the field contracted to be sold by him on the 5th of November, but I can discover no trace of the defendant knowing anything about this, and so far as he is concerned, and for aught he knew, such drafts were of no more value or significancy than if they had been delivered the day after the contract had been made in October, 1855. There does not appear to have been a tittle of evidence laid before the defendant or his solicitors to show that the plaintiff had any power or right to grant either the lease of his own field or of that bought from Mr. Strongitharm, or that Mr. Neville had any authority to grant the lease which he consented to the assignment of. If, therefore, the defendant was entitled to have a good title shown to grant this lease, no step was taken for that purpose before the month had expired nor up to the time of the filing of the bill.

It is true, that after the filing of the bill, it would have been a useless expense to have adopted any such course, and it was

incumbent upon the plaintiff to file his bill forthwith, which he did; but nevertheless, the making out the title is a matter which still remains to be done if the contract is to be enforced, and if the plaintiff now obtained a decree, many months might still elapse before the defendant could obtain a lease, with a reasonable security that he could hold it, and during that time the state of the coal trade might materially alter, and what is of more importance, the lease to be assigned would be continually diminishing in value.

The next question is, was the defendant entitled to require the plaintiff to make out a title to the lease in question? As a general proposition of law, in the absence of contract or waiver, this is not and can not be disputed. The contract is silent on the subject, no waiver is alleged, the acceptance of the title is not suggested, but it is said it was the duty of the defendant to ask for the abstract, and not having done so, it must be imputed to the defendant as *laches*, that he failed to do so. But the case which was cited for this purpose falls very far short of establishing such a proposition. Each case may be varied by its circumstances, and if there were a case in which the defendant might be excused from such a rule, it would, in my opinion, be one where, from the date of the contract and from the terms of it, it appeared that the vendor had not the means of delivering the abstract at that moment, but must wait for the completion of the arrangements with Mr. Strongitharm and Mr. Neville before he could do so; and where also the defendant might reasonably suppose that the purchaser was waiting till he could deliver an abstract of the title relating to the whole together.

The conclusion, therefore, to which I have come, upon the whole case, is, that the nature of the subject-matter of the contract, and the circumstances which affected the case prior to the 10th December, 1855, justified the defendant in giving the notice on that day; that the plaintiff having, at the expiration of that notice, failed in showing that he had complied with his part of the contract, or that he was in a situation to complete it, and the defendant never having waived the notice, the plaintiff is not entitled to the assistance of this court for the specific performance of the contract, and consequently the bill must be dismissed, and with costs.

CABE ET AL. v. DIXON ET AL.

(4 Jones Eq. 436. Supreme Court of North Carolina, 1859.)

[1] **Seeking benefit of discovery made by others.** In a contract to lease a mine for twelve months in order to encourage search for minerals, the lessor was to make good title to the lessees for one half the minerals discovered. The lessees laid by and allowed other parties claiming a right so to do to prospect for and discover "a valuable and rich copper mine" which added greatly to the value of the property, and further it did not appear that such lessees were able or ready to do the necessary work, although in their bill for specific performance they alleged that such discovery had been made "at the very point at which they intended to commence work." *Held*, that they were not entitled to specific performance.

Cause removed from the Court of Equity of Macon County.

Samuel B. Dixon was seized in fee of a small tract of land in Macon county, of about fifty-six acres, which, about the first of January, 1851, he contracted to sell to his brother, George W. Dixon, at $50, about $20 of which was paid down, and the remainder secured by bonds, at one, two and three years in equal installments, and took a bond from him in the penalty of $110 to make him, the said George W. Dixon, a title to the same as soon as the last note was paid. While this contract was in force, the said George W. Dixon executed to the plaintiffs the following contract in writing:

"NORTH CAROLINA, MACON COUNTY.

Be it known to all whom it may concern, that I, George W. Dixon, of Macon county, North Carolina, this day lease unto John Cabe of Fannin county, Georgia, and Samuel Cabe and Leander F. Cabe and L. D. Cabe, of Macon county, North Carolina, my lot of land I purchased of S. B. Dixon in the 13th district, for the term of twelve months from this date, for the purpose of mining and searching for copper or any other valuable mineral: Therefore, should the said Cabes discover or cause to be discovered, any copper or other valuable minerals on said lot, in said time, then I agree, and hereby bind myself to make or cause to be made unto the said Cabes, their

[1] *East Jersey Co.* v. *Wright*, 9 M. R. 332; *Kidmore* v. *Eikenberry*, 53 Iowa, 621, cited 12 M. R. 404.

heirs or assigns, good and lawful titles to one half of said mineral or minerals, together with the undisturbed right of way, wood and water for mining purposes.

June 7th, 1854.

Signed: GEO. W. DIXON."

One fifth of the interest thus conveyed, the parties sold to Aaron Matthews, and a memorandum thereof is indorsed on this paper, and he thus becomes, with the Messrs. Cabe, a party plaintiff.

The bill alleges that in pursuance of said contract of lease plaintiffs "prepared to develop all the mines on the said land, and went for that purpose, but that the defendant, George W. Dixon, and the other defendants, their confederates, refused to let them enter upon said land for that purpose or any other;" that they destroyed the written obligation which Samuel B. Dixon had given to George W. Dixon, and that the former then proceeded, and did lease the premises to the defendants, Saunderson, Ledford, Curtis, Cook, Trusty and Forrester, who gave to said George W. Dixon a written obligation, in the penalty of $10,000, to hold one half of said land in trust for him in fee; that this was all done with a full knowledge, on the part of these defendants, of the plaintiffs' equitable rights. The plaintiffs allege that they, again and again, requested to be let into the possession, and as further inducement, offered to pay S. B. Dixon all the remainder of the purchase money due him from G. W. Dixon, which turned out to be $37.62, which was refused, and the plaintiffs were fraudulently and forcibly prevented from testing the mine, while "they (the defendants), interfering thus improperly, have, at little cost, *at the very point at which they* (plaintiffs) *intended to commence work*, discovered a valuable and rich copper vein."

The prayer is for a specific performance and an account.

All the defendants answered. George W. Dixon says that he supposes he did execute a paper, like that set out in plaintiffs' bill, but that he was very drunk when it was done, and was made so by the contrivances of the plaintiffs, Leander, Lorenzo and Samuel Cabe, and therefore thinks plaintiffs ought not to have the relief sought. He further says that in the fall before, he had given Forrester and Trusty a lease on it

and the exclusive right to work in searching and operating for metals thereon; that one fourth of the minerals discovered was to be their compensation for such services, and the said George was to bear an equal share of the expense after the mine was opened, and an exhibit is filed of that purport, dated 21st of November, 1853; that Forrester and Trusty, in the month of September, 1854, commenced working the mine, and associating the defendant Cook, with them, they, in October following, made discoveries of copper to some extent; that in December the mine under their operations proved to be *very promising;* that during the progress of these explorations between September and December, finding the expense very heavy and the associates being poor, they took into their company the other defendants, Sanderson and Ledford, who contributed materially to the means and participated in the efforts to develop the mine. Various subdivisions and modifications of the interests of the parties took place, and the other defendants. Grady and Curtis, were also admitted on certain terms, all of which shares, interests and modifications of the association are set forth in the answers and by exhibits, but are not essential in the view taken of the case by the court. It appears, from the proofs filed, that during the progress of the work the plaintiffs, or some of them, were often present; that they made frequent inquiries as to the extent of discoveries made, and were informed without reserve of the results, but made no offer and asserted no right to participate in the expense or profits of the enterprise until after the property had become of very great value, one forty-eighth part having at one time sold for $500 and the other interests being considered of proportionate value.

The cause was set down for hearing on the bill, answers, proofs, exhibits and former orders, and sent to this court.

SHIPP and MERRIMAN, for the plaintiffs.

N. W. WOODFIN, J. W. WOODFIN and DICKSON, for defendants.

PEARSON, C. J.

The equity of the plaintiffs is not made out, because

there is no proof that they "discovered or caused to be discovered any copper or other valuable mineral" on the land mentioned in the pleadings which was the consideration of the agreement, which the bill seeks to have specifically performed; nor is there any proof that they were prepared, or able, or offered to do the work necessary to test the mine; on the contrary, according to the proof, they stood by and allowed the defendants to be at the expense and labor of testing the mine, and now seek, without having paid any consideration or having made any outlay of money or labor, to deprive the defendants of a title which they have paid for by labor and money.

Bill dismissed.

PER CURIAM.

TREASURER v. THE COMMERCIAL COAL MINING COMPANY.

(23 California, 390. Supreme Court, 1863.)

Specific performance of contract for stock. The general rule, that a court of equity would not enforce a specific performance of an agreement for the transfer of stock, applied particularly to public stocks, such as are commonly bought and sold in the market, and where exact compensation in damages could be awarded by a court of law.

Idem—Where the stock has no certain value. Where stock is of a peculiar and uncertain value, and where compensation in damages will not afford a party a full and adequate remedy, a court of equity will decree a specific performance.

[1] **Exception to general rule in case of mining stocks.** In this State, courts of equity will decree a specific performance of contracts for the transfer of mining stocks, owing to their fluctuating and uncertain value in market, and the difficulty of substantiating by competent evidence what would be a proper measure of damages.

Appeal from the District Court, Fifth Judicial District, San Joaquin County.

The facts are stated in the opinion of the court.

[1] Cited and followed, *Frue* v. *Houghton*, 6 Colo. 322.

M. G. COBB, for appellant.

The true rule in equity is, that specific performance of an agreement relating to chattels ought to be decreed, where equity and conscience require it, and where the remedy by action at law for damages would be inadequate, and no competent or just relief could be otherwise afforded: 2 Kent's Com., 9th Ed. 661; Mitford's Ch. Pl., 6th Am. Ed., 140, note *g*. The bill in this case, however, may well be sustained on the ground of trust: *Mech. Bank* v. *Seton*, 1 Peters, 203.

HALL & SCANIKER, for respondents.

CROCKER, J., delivered the opinion of the court, NORTON, J., concurring.

This is an action in the nature of a suit in equity, to compel the defendants, a corporation, to issue to the plaintiff a certificate of forty-six shares of the capital stock of the company. The defendants demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and rendered a final judgment for the defendants, from which the plaintiff appeals.

The complaint avers that the plaintiff, with others, located and took up a coal mining claim; that his co-locators, with others, formed the corporation defendants, for the purpose of mining for coal, with 2,500 shares of capital stock; that plaintiff and his co-locators, delivered the possession of their claim to the corporation, who took possession, and have ever since held possession; that in consideration thereof, the defendants agreed to issue to the plaintiff the one sixth of the capital stock, after deducting his share of the debts then existing against the original locators, and the expenses of organizing the corporation; that one hundred and sixty-two and two thirds shares were used to pay his share of said debts; that they have delivered to him two hundred and eight shares, leaving forty-six still due to him; that he demanded the stock, and they have refused to issue it. An amendment to the complaint sets forth the names of the trustees of the corpora-

tion, and prays that they be compelled to issue the stock, and for general relief.

The general rule is, that a specific performance will not be enforced of an agreement for the transfer of stock, on the principle that damages are a sufficient satisfaction: Fry on Spec. Perf., Sec. 24. This rule applies more particularly to public stocks, such as are commonly bought and sold in the market; and it has been held not to apply to railway shares and investments of that description, where the shares are limited in number and can not always be had in the market: *Duncuft* v. *Albrecht*, 12 Simons, 189. In which case it was also held that a parol agreement for the sale of such shares was binding, and that the contract was not within the Statute of Frauds: *Humble* v. *Mitchell*, 2 Rail. Cases, 70. So a bill to compel a specific delivery of certificates of shares of stock has been sustained: *Doloret* v. *Rothschild*, 1 Sim. & Stuart, 590; *Chater* v. *San Francisco S. R. Co.*, 19 Cal. 219. So of a bill to compel a transfer of York Buildings stock: *Colt* v. *Nettervill*, 2 P. Wm. 304. Justice Story, in his work on Equity Jurisprudence, (Vol. 2, Sec. 717,) speaks thus upon this subject: "And the true reason why a contract for stock is not now specifically decreed, is, that it is ordinarily capable of an exact compensation. But cases of a peculiar stock may easily be supposed, where courts of equity might still feel themselves bound to decree a specific performance, upon the ground that from its nature it has a peculiar value, and is incapable of compensation by damages. Indeed, it has been thought, that on contracts for stock a bill ought now to be maintainable generally in equity for a specific delivery thereof, upon the ground that a court of law can not give the property, but can only give a remedy in damages, the beneficial effect of which must depend upon the personal responsibility of the party." And it seems to be well settled, that where compensation in damages will not afford the party a full, complete and adequate remedy, a specific performance will be decreed: *Clark* v. *Flint*, 22 Pick. 231; *Mech. Bank* v. *Seton*, 1 Peters, 299; *Arundell* v. *Phipps*, 10 Vesey, 148; *Buxton* v. *Lister*, 3 Atkyns, 383; *Cowles* v. *Whitman*, 10 Conn. 121. Courts of equity have never hesitated to compel a transfer of stock held by a person in trust for another: *Mech. Bank* v. *Seton*, 1 Peters,

299; *Cowles* v. *Whitman*, 10 Conn. 121. In the peculiar condition of business and mining operations in this State, where numerous mining and other corporations are in existence, whose stock is often of fluctuating and uncertain value, and where certain kinds of stocks have a peculiar value to those acquainted with their affairs, where the market value of stocks, if any they have, is often difficult to substantiate by competent evidence, and where the risk of the personal responsibility of individuals and corporations is so great, courts should be liberal in extending the full, adequate and complete relief afforded by a decree of specific performance. In the view we have thus taken of the principles which should govern cases of this kind, the action of the court below was erroneous.

The judgment is therefore reversed, and the defendant is directed to answer the complaint within ten days after notice of the filing of the *remittitur* in the court below.

WELLAND ET AL., Appellants, v. HUBER, Respondent.

(8 Nevada, 203. Supreme Court, 1873.)

[1] **Prospector locating greater claim than he allows to his outfitters, held to specific performance.** Welland, Gross and Koch, in 1871, entered into a verbal prospecting contract with Huber, the defendant. They became his outfitters and he agreed to prospect for deposits, one equal fourth to belong to each party. While bound by this agreement he discovered the Huber ledge, on which he located 400 feet in his own name and 200 feet in the name of each of his three associates: *Held*, that the plaintiffs (Welland and Gross) were entitled to specific performance by conveyance from Huber of their interest in the 400 feet located in the sole name of the discoverer.

Conveyance out of and admission by plaintiffs. Plaintiffs had sold their interest in the specific feet located in their names to defendant, their associate, and had admitted that they had sold out their interest in the mine. *Held*, (but specifically upon the pleadings) that these facts were no bar to the decree prayed for.

Defense to be confined to issue raised by pleadings. In a suit to compel the conveyance of certain mining ground, where defendant relied upon an answer that plaintiff was not the owner or entitled to conveyance: *Held*, that the defense must be confined to the matter set up in such answer.

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[1] *Richmond Co.* v. *Rose*, 114 U. S. 576; *Settembre* v. *Putnam*, 11 M. R. 425.

Action for specific performance—Previous demand a matter of costs. Where a person has a right to a specific performance, such right depending upon the contract and not upon a breach of it, a demand of performance before suit brought is only important in reference to the costs of the action and has no bearing upon the merits or rights of the parties.

Costs in equity—Specific performance cases. Costs in equity are in the discretion of the court, and if a plaintiff unreasonably enforce an equitable right, depriving defendant of an opportunity to satisfy the claim made against him without suit, the relief may be granted without costs or plaintiff may be compelled to pay defendant's costs.

[1] **Implied promise of prospector to convey, without demand.** Where a party located certain mining ground in his own name but under contract for another person: *Held*, that there was an implied promise to convey upon request and that such other person at once acquired a right to a specific performance, which might be enforced in equity without a previous request.

Appeal from the District Court of the Seventh Judicial District, Lincoln County.

This was an action by Henry Welland and Lewis Gross, making August Koch a party plaintiff, for the dissolution of a mining partnership alleged to exist between them and Melchior Huber and a conveyance to said Welland and Gross of one hundred feet of mining ground, being a portion of four hundred feet located in the name of Huber in the Huber Ledge, Chief Mining District, Lincoln County.

In addition to the findings quoted in the opinion, the court below found, as facts, that no demand was made by plaintiffs upon defendant for the conveyance of any mining ground; that there was no proof of a refusal on the part of defendant to convey any mining ground prior to the commencement of the action; and, as a conclusion of law, "that to maintain an action for mining ground held by one party in trust for another, either as a copartner or under and by virtue of an agreement, a demand must first be made for the conveyance of the same."

Upon the facts and conclusions of law as found, the court below was of opinion that the defendant should have judgment for costs; and it was so ordered and entered. Plaintiffs moved for a new trial, which was overruled; and they then took this appeal from the judgment and order.

[1] *Huffman* v. *Hummer*, 2 M. R. 242.

A. B. HUNT, for appellants.

BISHOP & SABIN and J. C. FOSTER, for respondent.

By the Court, BELKNAP, J.

The complainants substantially allege: That in the month of December, 1871, they and defendant formed a copartnership for the purpose of discovering and locating mining claims; that in consideration of a prospecting outfit furnished the defendant he agreed to devote his time and services in prospecting for and locating mines in which all of the parties were to be equally interested; that in pursuance of this agreement defendant proceeded to the Chief Mining District and there located the Huber ledge; that said location contains 1,000 feet—400 of which are in the name of the defendant and 200 in the name of each of the complainants.

Complainant Koch sold all of his interest in the four hundred feet located in the name of the defendant before the filing of the bill. The bill prays for a dissolution of the partnership, and a conveyance to Welland and Gross of one hundred feet of the four hundred feet located in the name of Huber, and for costs.

Defendant answering, denies having made any agreement of copartnership, and that any copartnership between himself and complainants ever existed; and denies that the complainants are or ever were the owners of or entitled to a conveyance of the four hundred feet or any part thereof.

The case was tried by the court. The facts found were: "That on or about the 25th day of December, A. D. 1871, plaintiffs and defendant entered into a verbal agreement to prospect for and locate mines, by which it was agreed by plaintiffs to furnish provisions, money, and a horse for the use of defendant; and defendant agreed to give his services in prospecting for and making locations in Chief Mining District, Lincoln County, Nevada, in which all parties were to be equal owners;" that the complainants substantially complied with their part of the agreement; that under this agreement the Huber ledge was located by the defendant; that in February, 1872, Gross and Welland each sold two

hundred feet of the Huber mine to the defendant, and "after selling and conveying two hundred feet each in the Huber mine they claimed and acknowledged to have sold out of said mine, and to have sold their interest in the same;" that no copartnership has existed between the parties since about January 1, 1872.

The district judge ordered judgment to be entered in favor of the defendant; and from the judgment and an order denying a new trial this appeal is taken. At the trial the defendant introduced in evidence deeds from the complainants Welland and Gross for two hundred feet each, acquired by location, and proved that they had afterward declared they had sold their interest in the Huber mine. From this evidence the district judge finds as a conclusion of law that before the commencement of this action Welland and Gross conveyed their entire interest in the Huber mine to the defendant "either by deed of conveyance or by intendment."

The admission of this testimony for the purpose of proving that the defendant had acquired the interest of Welland and Gross in the four hundred feet was manifestly erroneous. The fact that the defendant was bound to defend upon the ground assumed by his pleading and no other, is a sufficient answer to the position taken by the district judge: *Smith* v. *Clarke*, 12 Vesey, 476; *Clarke* v. *Turton*, 11 Vesey, 240; *Gordon* v. *Gordon*, 2 Swanst. 400; *Blake* v. *Marnell*, 2 Ball & B. 35; *Beach* v. *Fulton Bank*, 3 Wend. 573; *Woodcock* v. *Bennett*, 1 Cow. 734.

In *James* v. *McKernon*, 6 Johns. 543, upon the question whether a defense was properly in issue, Ch. J. Kent said: "The good sense of pleading and the language of the books both require that every material allegation of this kind should be put in issue by the pleadings, so that the parties may be duly apprised of the essential inquiry and may be enabled to collect testimony and frame interrogatories in order to meet the question. Without the observance of this rule the use of pleading becomes lost, and parties may be taken at the hearing by surprise."

No demand for a deed was alleged or proven. The object of a demand is to place the defendant in default, and with some exceptions an action at law for non-performance of a

contract can only be maintained upon such technical default. The New York Court of Appeals, in *Bruce* v. *Tilson*, 25 N. Y. 197, say, "The distinction between an action for a specific performance in equity and a suit at law for damages for non-performance, is this: that in the latter the right of action grows out of a breach of the contract and a breach must exist before the commencement of the action, while in the former, the contract itself and not a breach of it gives the action. A demand of performance before suit brought is only important in reference to the costs of the action, and has no bearing upon the merits or the rights of the parties."

Costs in equity are in the discretion of the court, and if the plaintiff unreasonably enforces an equitable right, depriving the defendant of an opportunity to satisfy the claims made upon him without suit, the relief may be granted without costs, or the plaintiff may be compelled to pay the costs of the defendant.

If Huber located the four hundred feet in his own name in pursuance of the alleged partnership, he did so under an implied promise to convey to the complainants their interest in it upon request. The complainants at once acquired a right to a specific performance, and that right could be enforced in equity without a previous request.

The judgment and order of the district court are reversed and cause remanded for a new trial.

JEFFERYS v. FAIRS.

(L. R. 4 Ch. Div. 448. Ch. Div. of the High Court of Justice, 1876.)

[1] **Specific performance where subject-matter (coal) proves non-existent.** Defendants agreed to take a lease of the Shenkin coal vein, "being about two feet thick" with the underlying beds of fire-clay, at an annual fixed rent besides the royalties. On suit for specific performance brought to compel them to accept the lease, it was in evidence that on search the coal vein was found not to exist under the land described, although counter evidence left it uncertain whether the search had been

[1] *Haywood* v. *Cope*, 6 M. R. 499. See *Davis* v. *Shepherd*, Id. 24.

sufficient. *Held*, that defendants under the agreement had a license to search for the vein, but not a warranty that it would be found, and accordingly plaintiff was entitled to specific performance, whether the Shenkin vein existed or not.

This was an action for specific performance of an agreement dated the 6th of July, 1874, by which the defendants Fairs and Kirkhouse agreed "to take the vein or seam of coal called the Shenkin vein, and being about two feet thick, with the overlying and underlying beds of clay on and under the farm called Llwyndu, etc., Glamorganshire, such veins or beds being contiguous or in juxtaposition. Term sixty years from 29th September, 1874. Rent £100 per annum as certain or dead-rent, payable £25 at Lady day, 1875, and £50 every subsequent half year. Royalties 9*d.* per ton for the coal and 4*d.* per ton for the clay. Lessees to have any part of the farm above the Swansea Railroad at the rent of £10 per acre, not being less than one acre, for the same term, and to expend not less than £500 in the erection of a manufactory and other buildings for the purpose of working the coal and clay. Way-leave for foreign coal and clay 1*d.* per ton. Lessees to have power to determine the lease at the end of the first three years of the term, on giving twelve calendar months' notice in writing to the lessor. The lease to contain all proper and usual covenants, including a three years' average clause in ascertaining the amount of royalties."

"*Memorandum.*—This agreement is conditional on the taking of Messrs. Cory, Yeo & Co., being restricted to the lower or deeper veins of coal and other minerals as verbally arranged with them."

Pursuant to this agreement the defendants entered upon a portion of the land, which was on a mountain slope above the Swansea Vale Railway, and made excavations and searched for coal and fire-clay, but did not succeed in finding the vein.

These operations were conducted by the defendant Kirkhouse, who was a mineral surveyor, and on the 3d of October, 1874, the defendant Fairs wrote to the plaintiff to inform him that they had completely failed in finding the coal, and that they had come to the conclusion that the vein of coal they were looking for must be running out there. They had found

the fire-clay in its proper place but of a very inferior quality, and no sign of any leader, such as they might expect, which would lead to the coal. "So we fear we must abandon it altogether, as it will not pay without we can make a good fire-brick to meet the market." In the course of the correspondence the plaintiff wrote: "I took for granted that you knew the coal could be got as well as the fire-clay, which latter seemed to be your principal object in taking the lease. I told you in my last that on the faith of your agreement I reduced the rent, payable by Messrs. Cory, Yeo & Co. (who were working the lower or deep veins of coal), by one half, viz., £100 to £50; but I still hope you will persevere, and if you still fail I will consider to what extent I can fairly relieve you." In a subsequent letter the plaintiff reminded Fairs that his partner, the defendant Kirkhouse, being a mineral surveyor, "ought certainly to have satisfied you and himself about the coal before the agreement was made and signed." In the result, the defendants, considering that it was out of the question to work the fire-clay without the coal, declined to have anything more to do with the property, and had refused to pay the dead-rent, and also the rent for the surface land of which they had taken possession under the agreement.

Under these circumstances the plaintiff commenced an action, in which he claimed specific performance of the agreement of the 6th of July, 1874, and payment of the sums due for dead-rent under the agreement, and for rent of the surface land.

The case raised by the statement of defense was that the defendants had entered into the agreement on the faith and in the assumption that there was coal to be got in the Shenkin vein; that they had ascertained, by boring and searching in the ordinary way, that there was no coal in the alleged Shenkin vein under the Llwyndu farm, and that they accordingly repudiated the agreement, had given up possession of the land, and refused to pay any dead or surface rent, or to execute a lease.

In his evidence given in court, the plaintiff stated that the defendants came and applied to him for the lease, and proposed terms which were accepted by him. He knew nothing of the Shenkin vein, and was first informed of its existence by

the defendants. There were no preliminary negotiations. Evidence was also given on behalf of the plaintiff to the effect that the defendants had not thoroughly and fairly tested the locality, as at the point selected by them the strata were loose, apparently indicating a slip of the ground caused by surface floods; and that although the Shenkin vein, which was visible, and being worked on the other side of the mountain three miles off, did not reach the trial hole made by the defendants on the slope of the mountain, it was far from proved that the vein was not there; and in the opinion of the plaintiff's agent, who had assisted the defendants in their search, and was called as their witness, the experiments made were by no means conclusive or satisfactory.

KAY, Q. C., and HOWELL JEFFREYS, for the plaintiff.

Sir H. JACKSON, Q. C., and BEVIR, for the defendants.

BACON, V. C.

The defendants contend that specific performance can not be granted, and that they are entitled to repudiate the contract, because the plaintiff has not proved the existence of the mine under the demised property. I have no doubt, however, that mining agreements are not dependent for their efficacy upon any such rule as that. What is the bargain between the parties? The defendants take their chance of finding that the property contains minerals, and of getting all they can out of it. Even in the case of a mine in actual working, it may turn out most unprofitable. How, then, is the lessor responsible? What has he to do with it, unless I am to read the agreement as containing a guaranty on his part that the Shenkin vein existed under the demised property? I am clearly of opinion that I can not do so. The defendants, knowing at least as much about it as the plaintiff did, apply to him for a lease for the purpose of working the fire-clay and the coal, the latter being necessary for working the former with advantage. He, not knowing anything about it, takes their word for the truth of the representation, and agrees to grant the lease. In the agreement there is not one word as to guarantying that there

is this Shenkin vein, or that coal will be found under the property to be demised. All that it amounts to is a license to enter and search for the vein of coal, and make what they could out of it. It has been said that a lease of minerals amounts to a sale and purchase out and out. In whatever sense that may be true, it can have no application to payment of a dead-rent which is reserved in respect of this license to enter and search, and is payable whether there is a vein of coal or not. What is there to exempt the defendants from paying the dead-rent, because they have not yet succeeded in finding the vein? There is no analogy whatever to the case of a man selling shares which are utterly worthless, or a cargo of corn which had no existence. There is nothing like fraud on the part of the lessor. The defendants have, in fact, got all they bargained for; which was the chance of finding the vein of coal under the particular property, and a whole series of authorities shows that that is the true way of looking at transactions of this kind. It is true that in some of the cases there was an executed lease, but that is an immaterial circumstance. The important point is, whether the defendants got what they contracted for. They say they did not, and that therefore the bargain is bad. But I think that the thing bargained for was simply the right to go upon the land and search for and get the mineral, and make such a use of it as they saw fit. They knew the hazard attending it, and knowing it, they protected themselves by having the lease made determinable at the end of three years. That is the protection which they have under the agreement. They have tried experiments—which appear not to have been very conclusive, for one of the witnesses says it was in the wrong place—and have not yet found any coal. It would be against reason, against justice and against the whole chain of authorities to let the defendants off their bargain. The lessor has complied with his part of the bargain; and there is no reason why the dead-rent should not be paid.

The plaintiff is, therefore, entitled to judgment for specific performance, and an order for payment of the dead-rent that has accrued up to this time.

1. Misrepresentations, even if made in ignorance, will defeat specific performance: *Fisher* v. *Worrall*, 5 Watts & S. 478; *Post* VENDOR AND PURCHASER.

2. To defeat it, fraud need not be shown; it is enough that the contract is unfair: *Frisby* v. *Ballance*, 5 Ill. 287; 39 Am. Dec. 409.

3. Specific performance of agreement for a lease can not be resisted because the party is ignorant of mining and the working of the mine had theretofore been unprofitable: *Haywood* v. *Cope*, 6 M. R. 499. Instances of its allowance under oppressive circumstances: *Id.*; *Clapham* v. *Shillito*, 6 M. R. 431.

4. Specific performance by vendor not enforced because of clause in contract allowing him to rescind: *Mawson* v. *Fletcher*, L. R., 6 Ch. App. 91; *Post* VENDOR AND PURCHASER.

5. Specific performance of an award granting to plaintiff the right to use a certain part of defendant's railway, not enforced because the court could not attend to its continuous performance: *Blackett* v. *Bates*, L. R., 1 Ch. App. 117. To same effect: *Abinger* v. *Ashton*, 6 M. R. 1.

6. Specific performance of contract for sale of minerals under given surface decreed, with power to inspect reserved: *Blakesley* v. *Whieldon*, 8 M. R. 8.

7. Vendee must first perform the conditions required of him: *Thayer* v. *Wilmington Co.*, 105 Ill. 540.

8. What evidence of title vendor is bound to give upon bill for specific performance of contract to purchase shares: *Curling* v. *Flight*, 5 Hare, 244; 6 Id. 41; 2 Phillips, 614.

9. Proper parties upon bill for specific performance: *Davis* v. *Henry*, 6 M. R. 680.

10. Delay as a bar to the specific performance of an award of terms for taking a lease of a colliery: *Eads* v. *Williams*, 24 L. J. Ch. 531.

11. Bill for specific performance of a contract to sell a mineral vein to the discoverer: *North Georgia M. Co.* v. *Latimer*, 12 M. R. 367. The "prospect" is the consideration in such cases: *Id.*

12. Bill for specific performance of an agreement to take a lease for forty-two years, of iron and coal mines and machinery, for the purpose of trade, dismissed on account of delay by lessor to make out his title, and give possession: *Parker* v. *Frith*, 1 Sim. & S. 200, *note*.

13. Arrears of rent only decreed to be paid into court by purchaser holding lease as well as agreement: *Robertshaw* v. *Bray*, 35 L. J. Ch. 844.

14. Decree for the execution of a proper conveyance of oil lands, to cure defective deed: *Stowell* v. *Haslett*, 5 Lansing, 380.

15. Covenant in mining lease so oppressive that court ought not to enforce it nor enjoin its breach: *Talbot* v. *Ford*, 8 M. R. 347.

16. *Laches* fatal to bill for specific performance: *Boone* v. *Missouri Co.*, 17 How. 341.

17. Specific performance refused, of lease reserving to lessee option to quit on notice: *Rust* v. *Conrad*, 41 Am. R. 720; 47 Mich. 449.

18. Specific performance as a matter in the court's discretion: *Id.*; *Frisby* v. *Ballance*, 5 Ill. 287; 39 Am. Dec. 409; *Rutland Marble Co.* v. *Ripley*, 3 M. R. 291.

19. A refusal to convey dispenses with tender: *Huffman* v. *Hummer*, 2 M. R. 242.

20. Effect of sudden appreciation of value: *Falls* v. *Carpenter*, 6 M. R. 398.

21. The complaint must state the contract so as to show the consideration fully: *Mayger* v. *Cruse*, 6 Pac. 323.

22. Defendant claimed that the land was subject to exception of minerals; plaintiff consented to the exception: *Held*, that defendant could not further resist specific performance: *Anderson* v. *Kennedy*, 51 Mich. 468.

23. A contract for lease of mines may be specifically enforced: *Wharton* v. *Stoutenburgh*, 35 N. J. Eq. 266.

24. Disagreement as to details will not defeat the bill: *Id.*

25. It is a question of fact whether a bargain has so far progressed as to become a contract which equity will specifically enforce: *Id.*

26. Prospecting contract to convey an interest in consideration of development and to refund expenditures, enforced: *Waterman* v. *Waterman*, 27 Fed. 827.

WHEATLEY v. BAUGH.

(25 Pennsylvania State, 528. Supreme Court, 1855.)

[1] **Where a subterranean flow of water has become so well defined as** to constitute a regular and constant stream, the owner of the land above, through which it flows, may not divert or destroy it to the injury of the person below, on whose land it issues in the form of a spring.

But where the spring depends for its supply upon percolations through the land of the owner above, and in the use of the land for mining or other lawful purposes the spring is destroyed, such owner is not liable for the damages thus done, unless the injury was occasioned by malice or negligence.

No servitude in favor of percolating waters. The prior use of a spring for the purposes of a tannery, confers no right of servitude over or through the land of the adjoining proprietor through whose land the water percolates.

[2] **Idem—No prescription.** Nor would the enjoyment of the spring for twenty-one years raise any presumption of a grant; for no presumption would arise against the owner until it was shown that the exercise of the privilege interfered with his rights in such manner as to entitle him to legal redress.

Error to the Common Pleas of Chester County.

Action on the case brought by Jacob Baugh v. Charles M'Wheatley under the following circumstances: The plaintiff was a tanner, and resided in Schuylkill township, Chester county, a short distance from Phœnixville. He occupied as a lessee for years, a tan-yard with its appurtenances, comprising about an acre of ground, from 1824 or '25 to 1853, and carried on his business during the whole of that time. Upon the property which he thus occupied was a spring of water which he constantly used for the purposes of his business. A valuable copper mine having been discovered on the adjacent farm of the late Judge Morris, arrangements were made for working it, in the year 1852. A shaft was sunk to some depth and a small engine set to work to pump out the water which interfered with the operations of the miners. In September, 1853, a larger and more powerful engine was procured, by which the amount of the water pumped out of the mine was greatly

[1] *Cross* v. *Kitts*, 69 Cal. 217; *Strait* v. *Brown*, 16 Nev. 317; *Barnes* v *Sabron*, 4 M. R. 674.

[2] *McBee* v. *Loftis*, 3 M. R. 222.

increased. About two weeks after this new engine began to work, the tan-yard spring ceased to flow. The engine continued to work till the 13th of January following; it then stopped. Two weeks after the water of the tan-yard spring began to flow with its accustomed volume. About the first of February the engine started again, and about the middle of the month the water again left the spring-head. In the following June the operations of the mine were suspended, and soon after the water began to flow at the spring as formerly, and continued to do so till the time of the trial.

The shaft is about 550 yards from the spring, in a southeast direction. The surface of the ground at the shaft is some fifty feet higher than at the spring, and is the highest in that immediate neighborhood. Several other mines were in operation at the same time with the Morris Mining Company, within two miles distance, on lower ground and with deeper shafts.

The suit was brought against Wheatley, as agent of the Morris Mining Company, to recover damages for the injury which the plaintiff sustained by the loss of the water of the tan-yard spring, in his tanning business.

The jury found a verdict for the plaintiff for $175 damages, and the defendant removed the record by writ of error to this court.

LEWIS and J. M. READ, for plaintiff in error.

PENNYPACKER, for defendant in error.

The opinion of this court was delivered by LEWIS, C. J.

A mining company in the course of necessary operations in mining minerals from their own land, interrupted the percolations which supplied a spring on an adjacent tract, and the owner of the spring, under the direction of the court below, recovered damages for the loss of it. The question is, can this recovery be sustained?

The general principle undoubtedly is, that he who owns the soil has it even to the sky, and to the lowest depths. He may dig as deep and build as high as he pleases. The maxim which embodies the principle is, "*cujus est solum ejus est*

usque ad cœlum et ad infernos." If this general rule be applicable to the case before us, the plaintiff in error is justified in all that he did on the land of his principals by their direction. But there are some restrictions upon this general right of property, which it becomes necessary to notice. The natural streams of water existing by the bounty of Providence, for the benefit of the land through which they flow, are incidents annexed to the land itself: 4 Mason, 400; 12 Wend. 332. They do not begin by consent of parties, nor by prescription, but *ex jure naturæ*, and therefore they are not extinguished by unity; nor can they be obstructed or diverted to the prejudice of adjacent proprietors: *Sury* v. *Piggot*, Popham, 170; 3 Bulst. 339. It was said by Sir John Leach in *Wright* v. *Howard*, 1 Sim. & Stuart, 190, that "every proprietor who claims a right either to throw the water back above or diminish the quantity which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years."

It is true that there is a difference between water-courses on the surface and those which run under ground: *Acton* v. *Blundell*, 12 Mees. & Welsby, 324. But that distinction does not authorize neighboring proprietors to disregard the necessities of each other's condition in respect to the latter. It is manifest that valuable rights may exist in both, and it is indisputable that wherever they do exist, they must be protected by law. In limestone regions, streams of great volume and power pursue their subterranean courses for great distances, and then emerge from their caverns, furnishing power for machinery of every description, or supplying towns and settlements with water, for all the purposes of life. To say that these streams might be obstructed or diverted, merely because they run through subterranean channels, is to forget the rights and duties of man in relation to flowing water. But to entitle a stream to the consideration of the law, it is certainly necessary that it be a water-course, in the proper sense of the term. A spring gutter on the surface is none the less a water-course, although it is not equal in volume to a river. Small as it may be, if it have a clear and well defined

channel, and a regular flow in that channel, it can not be diverted to the injury of the proprietors below: *Jack* v. *Martin*, 12 Wend. 320. So a subterranean stream which supplies a spring with water, can not be diverted by the proprietor above, for the mere purpose of appropriating the water to his own use: *Smith* v. *Adams*, 6 Paige, 435. As the owner of the land below is bound to permit the stream to flow in its accustomed channel, and can not erect obstructions so as to throw the water back on his neighbor above, so the latter is bound as a correlative obligation to permit it to flow to his neighbor below. Each has a right to a reasonable use of the water on his own premises, but he must so exercise his privilege as not to injure the rights of the other. "*Sic utere tuo ut alienum non lædas*" is the maxim especially applicable to the enjoyment of these rights. When the filtrations are gathered into sufficient volume to have an appreciable value, and to flow in a clearly defined channel, it is generally possible to see it and to avoid diverting it without serious detriment to the owner of the land through which it flows. But percolations spread in every direction through the earth, and it is impossible to avoid disturbing them without relinquishing the necessary enjoyment of the land. Accordingly, the law has never gone so far as to recognize, in one man, a right to convert another's farm to his own use, for the purposes of a filter.

Such a claim, if sustained, would amount to a total abrogation of the right of property. No man could dig a cellar or a well, or build a house on his own land, because these operations necessarily interrupt the filtrations through the earth. Nor could he cut down the forest and clear his land for the purpose of husbandry, because the evaporation which would be caused by exposing the soil to the sun and air would inevitably diminish, to some extent, the supply of water, which would otherwise filter through it. He could not even turn a furrow for agricultural purposes, because this would partially produce the same result. Even if this right were admitted to exist, the difficulty in ascertaining the fact of its violation, as well as the extent of it, would be insurmountable. The Roman law, founded upon an enlightened consideration of the rights of property, declared that "he who, in making a new work upon his own estate, uses his right without trespassing either

against any law, custom, title or possession which may subject him to any service toward his neighbors, is not answerable for the damages which they may chance to sustain thereby, unless it be that he made that change merely with a view to hurt others without any advantage to himself." "He may raise his house as high as he pleases, although by the elevation he should darken the lights of his neighbor's house:" Domat, § 1047. He may dig for water on his own ground, and if he should thereby drain a well or spring in his neighbor's ground, he would be liable to no action of damages on that score: Domat, § 1581; Pardessus' Traite des Servitudes, § 76; Dig. 39, 2, 24, 12; Dig. 39, 3, 1, 12; Dig. 39, 2, 26; Dig. 39, 3, 21. These principles of the civil law are also the recognized doctrines of the common law: *Burg* v. *Pope*, 1 Cro. Eliz. 118; *Parker* v. *Foote*, 19 Wend. 309; *Hoy* v. *Sterrett*, 2 Watts, 331; *Greenleaf* v. *Francis*, 18 Pick. 121; *Acton* v. *Blundell*, 12 Mees. & Wels. 324. It is true that several English Nisi Prius decisions introduced a modern doctrine in relation to ancient lights in opposition to that held in the reign of Queen Elizabeth, by all the judges in the Exchequer Chamber: 1 Cro. Eliz. 181. But the modern doctrine was never recognized by the King's Bench, until the decision in *Darwin* v. *Upton* in 1786, 2 Saund. 175, n. 2. As that decision was since the American Revolution, after which English courts ceased to have authority here and is an anomaly in the law, the modern doctrine founded upon it has not been received as suitable to the condition of this country: 19 Wend. 309; 2 Watts, 331. In *Acton* v. *Blundell*, it was held that the defendant had a right to sink coal pits on his own land, although he thereby drained a well on the plaintiff's land. In *Greenleaf* v. *Francis*, it was decided that the owner of land may dig a well on any part of it, notwithstanding he thereby diminishes the water of his neighbor's well, unless in doing so, he is actuated by a mere malicious intent to deprive his neighbor of the water without benefit to himself: 18 Pick. 117.

Neither the civil law nor the common law permits a man to be deprived of a well, or spring, or stream of water, for the mere gratification of malice. The reason is, that water, like air, is of such a nature that no one can have an exclusive right in it. In the process of evaporation and condensation, it is

sent in refreshing showers all over the earth. In its descent to the ocean it necessarily passes from one to the other, and is intended for the benefit of all. The right of each is more or less dependent upon that of his neighbor. In this description of property, it is therefore peculiarly necessary that each should be mindful of the necessities and rights of the others. The owner of land on which a spring issues from the earth has a perfect right to it against all the world, except those through whose land it comes. He has even a right to it as against them until it comes in conflict with the enjoyment of their own property. Strangers can not destroy it, even though it be derived from lands which do not belong to the owner of the spring. Even a railroad corporation armed by law with the eminent domain, and having power to take private property for the construction of its road, is answerable to the owner of a spring for destroying it, although its destruction be caused by excavations on the land of an adjacent proprietor: *Parker* v. *Boston & M. Railroad*, 3 Cush. 107. But while the court in that case held that the corporation was liable, on the ground that the destruction of the spring was not required for the purposes of the owner of the land through which the excavation was made, the principle was fully recognized that each proprietor has a right to make a proper use of his own land, and that sinking a well upon it is such proper use; and if the water by its natural current, flows from one to the other, and a loss arises, it is *damnum absque injuria: Parker* v. *Boston & M. Railroad*, 3 Cush. 107; American Railway Cases, 553.

The prior occupancy of the spring for the uses of a tannery gave no right of servitude over or through the land of the adjacent proprietor. No man by mere prior enjoyment of the advantages of his own land can establish a servitude upon the land of another. This is shown in a satisfactory manner by Mr. Justice Rogers in *Hoy* v. *Sterrett*, 2 Watts, 330. But it seems to be thought that the enjoyment of the spring by the plaintiff below and those under whom he claims, for the period of twenty-one years, gives him a right to its continued existence, although the neighboring proprietor may thereby be deprived of the chief value of his own land. This depends upon the question whether the enjoyment of the spring was of such a character as to have invaded his neighbor's rights,

so as to enable the latter to maintain an action for the injury. No man can be barred by a Statute of Limitation for not bringing his action within the prescribed period, until it is first shown that he had a cause of action which he could have maintained. In analogy to the statute, no presumption can arise against a party on the ground of long enjoyment of a privilege by another, until it is shown that the privilege in some measure interfered with the rights of the party whose grant is proposed to be presumed, and that he had a legal right to prevent such enjoyment by proceedings at law. Presumption is when the conduct of the party out of possession can not be accounted for without presuming a conveyance: *Kingston* v. *Lesley*, 10 Ser. & R. 390; *Butz* v. *Ihrie*, 1 Rawle, 218. The Frederician Code of Prussia provides that no presumption can take place where no negligence can be imputed, and accordingly by that code a man may raise his house, after any lapse of time, although it darkens his neighbor's house: Frederician Code of Prussia, 48, 55. The same principle is to be found in the law of Scotland: Erskine's Prin. Law of Scot., 350.

The owner of the mine had no right to complain of his neighbor below for making use of the spring on his own lands. As long as it flowed there he had a right to make use of it, and the owner of the land through which the supply of water came, was not, in any manner, injured by such use of the water. Silence or acquiescence, where one is not injured and has no cause of complaint, can never deprive him of his rights on the ground of presumption of a grant. No man can be said to have granted a right about which it would have been an impertinent interference to utter a complaint: *Hoy* v. *Sterrett*, 2 Watts, 331; Merlin's Repertoire de Jurisp. verb. "Cours d' Eau." Besides it was impossible for him to know from whence the supply of water came. He had no knowledge that it was derived from percolations through his own land. In this respect there is a material difference between hidden veins of water under the ground and water-courses flowing on the surface. The latter are apparent, and if appropriated in such a way as to injure the rights of the owner through whose land they flow, he can take cognizance of the wrong, and is bound to redress it by action within the period prescribed by

law. But the former are not apparent, and the owner of the land is not bound to resort to an action to redress a wrong of which he can not, by any possibility, have notice. By the Civil Code of Louisiana, *non-apparent servitudes* can be established only by title. Immemorial possession alone is not sufficient to acquire them: Civil Code Louis, tit. Servitudes, p. 240; Pardessus' Traite des Servitudes, § 95. In a case like the present, therefore, there is no reason whatever for depriving the plaintiff in error of the enjoyment of his rights of property on his own land, on the ground of any servitude established by time, or acquiescence for the benefit of the tannery on the adjacent tract. We have treated the spring as depending upon percolations alone, at the point where the mining operations were carried on, because the evidence does not show that any distinct water-course leading to it has been cut off or diverted. If this should be shown, and it should also appear that it could have been preserved without material detriment to the owner of the land through which it flowed, the destruction of it might be attributed to malice or negligence. In that case the law would furnish redress, because the injury would be unjustifiable. The beneficent Being who created the earth, and gave man diminion over it, imposed on him the duty of doing to others as he would that they should do to him. Upon this high moral obligation rests the legal one which requires every one so to use his own privileges as not to injure the rights of others. In all the relations of social life, it is the interest and duty of each to respect the privileges of others. The law which requires this "acts with a reasonable reference to the public convenience and general good; and it is not betrayed into narrow strictures subversive of common sense, nor into extragavant looseness which would destroy private rights." *Tyler* v. *Wilkinson*, 4 Mason, 397. In determining what is reasonable, the circumstances of each case must be carefully considered, and the jury under the instructions of the court, must, in general, decide the question: *Hetrich* v. *Deachler*, 6 Barr, 32; *Miller* v. *Miller*, 9 Barr, 74. The owner of a spring, although his right is imperfect where the supply is derived through his neighbor's land, has nevertheless a privilege, subordinate only to the paramount rights of such neighbor, and it is only when the fair enjoyment of

those paramount rights requires its destruction that he is bound to submit to the deprivation. In conducting extensive mining operations, it is, in general, impossible to preserve the flow of the subterranean waters through the interstices in which they have usually passed, and many springs must be necessarily destroyed in order that the proprietors of valuable minerals may enjoy their own. The public interest is greatly promoted by protecting this right, and it is just that the imperfect rights and lesser advantage should give place to that which is perfect, and infinitely the most beneficial to individuals and to the community in general.

There was no evidence to justify the jury in presuming a grant of a servitude; nor was there any testimony tending to show either malice or negligence in conducting the mining operations. There was nothing to show that the mining company had been guilty of anything beyond the proper use of their own property.

The plaintiff below had, therefore, no cause of action, and the jury ought to have been so instructed.

Judgment reversed and a venire facias de novo awarded.

1. Description in deed of springs by name acquired by reputation upheld: *Lake Vineyard* v. *San Gabriel*, 58 Cal. 51.

2. As to what are percolating waters and what are underground streams, compare *Strait* v. *Brown*, 16 Nev. 317, and *Hebron Co.* v. *Harvey*, 90 Ind. 192; 46 Am. R. 199. Property in percolating waters: *Cross* v. *Kitts*, 10 Pac. 409. See notes, 64 Am. Dec. 727; 84 Id. 517.

3. Waters sinking and re-emerging: *Saddler* v. *Lee*, 66 Ga. 45; 42 Am. R. 62; *Barnes* v. *Sabron*, 4 M. R. 674.

4. Underground currents not water-courses; *Haldeman* v. *Bruckhart*, 5 M. R. 108.

5. Spring drained by mine is *damnum absque injuria: Trout* v. *McDonald*, 9 M. R. 32.

6. Where mineral water flows underground under adjoining lands, each owner should use the same as proprietor of "underground riparian rights": *Burroughs* v. *Satterlee*, 25 N. W. 808.

CADDICK V. SKIDMORE.

(2 De Gex & Jones, 52. High Court of Chancery, 1857.)

Partnership agreement—Subleases. An agreement between A, a lessee of a mine, and B, to become partners in the mine, paying the reserved rent, subletting the mine at a royalty and dividing the profits: *Held*, to be within the Statute of Frauds, and not sufficiently proved by a receipt signed by A and given to B, for a sum as B's share of the head rent of the mine, the sum being exactly half of that rent.

This was an appeal from the decision of Vice-Chancellor KINDERSLEY, dismissing a bill for an account of the profits of an alleged mining partnership, one of the defenses being that there was no sufficient agreement within the Statute of Frauds.

The case stated by the bill was in substance as follows: That Mr. Skidmore, the defendant, had, under an indenture of the 29th of August, 1846, become entitled for a term of twenty years to certain beds of coal, iron-stone and iron ore situate at Tividale, in the parish of Rowley Regis, in Staffordshire, subject to the payment, during the first seven years of the term, of the yearly sum of £500. That at the time of the defendant taking this lease he had been working in partnership with a Mr. Wagstaff, an adjoining colliery called the Sutherland colliery. That shortly after the execution of the lease of the Tividale colliery the defendant called on the plaintiff and showed him the lease and invited him to become a partner with him in the working colliery, except three acres, being the upper part thereof, telling the plaintiff that he and Mr. Wagstaff had taken these three acres and had paid £2,000 as the consideration for them, and asking the plaintiff to become a partner with him in working the residue. That the plaintiff and defendant thereupon agreed to become, and did in fact become, partners, upon the terms that the Tividale colliery, exclusive of the three acres, was to be managed and carried on by the defendant in his own name; that the plaintiff was to be a dormant partner therein, and that the plaintiff and the defendant were to be equally interested in the profits of the

concern. That in the spring of the year 1847 the plaintiff and defendant commenced preparations for opening the Tividale colliery, and for that purpose purchased some old machinery. That on the 13th of July, 1847, the plaintiff paid the defendant £300, whereof £250 was contributed toward payment of the first installment, which was due under the lease, and the remaining £50 toward the expenses incurred in preparation for working the colliery. That from the time of entering into the partnership the defendant had the sole control over the colliery, and that all payments on account thereof were made through him. That in 1847 the defendant let the mine for fourteen years at a royalty, and paid the plaintiff various sums specified in the bill on account of his share of the profits, and that the plaintiff paid from time to time various sums to enable the defendant to pay the head rent. That in the month of January, 1852, the defendant induced the plaintiff, by fraud and misrepresentation, to give up his interest in the colliery. The prayer was for a declaration that the plaintiff was a partner with the defendant in the Tividale colliery until a sale thereof, which the defendant had made in December, 1853, and for an account of the dealings and transactions of defendant in respect of the colliery, and that the defendant might pay what was due to the plaintiff upon accounts.

The defendant, by his answer, denied the existence of any such agreement as was alleged by the bill, and claimed the benefit of the Statute of Frauds.

The only written documents relied upon as evidence of the agreement were three receipts, which were as follows:

"Received of Mr. Elisha Caddick the sum of £300, on account of his share in the Tividale mine.

"Received of Mr. Elisha Caddick the further sum of £300, on account of his share in the Tividale mine.

"Handsworth, 31st October, 1849. Received from Mr. Caddick £250, his share of dividend in mine installment due to Messrs. Bannister for the Tividale mine."

Parol evidence was gone into in support of the alleged agreement and of the alleged fraud. On this evidence the vice chancellor came to the conclusion that the agreement which appeared on the evidence to have been entered into

was not for a general partnership, but for paying the reserved royalty, subletting the mine at a royalty, and dividing the profit, and consequently did not establish the case alleged by the bill, which His Honor on that ground dismissed.

Mr. GLASSE and Mr. C. HALL, in support of the appeal.

The ATTORNEY GENERAL, Mr. FREELING, and Mr. PEARSON, for the respondent.

The following cases were referred to: *Forster* v. *Hale*, 5 Ves. 314; *Blagden* v. *Bradbear*, 12 Ves. 466; *Clinan* v. *Cooke*, 1 Sch. & Lef. 22; *Reynolds* v. *Waring*, Younge, 346; *Bligh* v. *Brent*, 2 Y. & C., 268; *Dale* v. *Hamilton*, 5 Hare, 369; *Curling* v. *Flight*, 2 Phil. 613; *Baxter* v. *Brown*, 7 Man. & Gr. 198; *Powell* v. *Jessopp*, 18 Com. B. 336; *Watson* v. *Spratley*, 10 Ex. 222.

THE LORD CHANCELLOR (after stating the facts) said:

It is unnecessary to determine whether the statement of the agreement in the bill is such as would warrant a decree upon the agreement appearing upon the evidence, because, assuming the bill to have stated such an agreement as appears to me upon the strong balance of evidence to be established, that is to say, an agreement to the effect that the plaintiff and defendant were to become partners in the colliery for the purpose of demising it upon royalties which were to be divided in some proportion between them, it would, in my opinion, be an agreement not capable of being enforced, unles proved by such evidence as is required by the Statute of Frauds; for there does not appear to be anything to take this case out of the operation of the statute. Now there certainly was no agreement signed at the time. The only signatures that have been referred to as satisfying the requirements of the statute are the receipts which were signed on different occasions by the defendant Skidmore when money was paid to him by the plaintiff. (His Lordship read them.)

The last of these receipts is the only one of the documents that creates any doubt as to whether there was a sufficient sig-

nature to take the case out of the operation of the Statute of Frauds. The fair inference to be drawn from that document is, that upon some terms or other the plaintiff had bound himself to contribute toward payment of the installment mentioned in the receipt. But that is not sufficient to take the case out of the operation of the statute, which requires that an agreement relating to land should be an agreement signed by the party to be charged. And although the court has struggled to bring within the description of a signed agreement any instrument, however informal, which does in truth disclose what the terms of the contract were, it has never repealed the Statute of Frauds by holding a writing to be within its meaning which has not that effect—*i. e.*, which does not by plain words or reasonable inference disclose what was the contract of the parties.

Now, although the last receipt may show, and I think does show, that there were certain terms, one part of which was that the plaintiff was to pay a portion of the rent, or perhaps even shows that he was to pay half of the rent, yet it does not show what the other terms were, according to which the alleged partners were to be mutually interested in the result of this payment, and they are distinctly at issue upon that subject. The plaintiff states the intention to have been that the partners were to be jointly interested without more; on the other hand, the defendant insists that although a joint interest may have been agreed upon, yet that before any division, the plaintiff was to contribute to some large previous outlay of the defendant, who was also to have a large charge upon the royalties.

The parties, therefore, are distinctly at issue as to what the contract was, and the very object of the Statute of Frauds was to prevent parol evidence being gone into to elucidate that which the parties have failed, to make distinct by reducing it into writing. In my opinion, that affords a conclusive answer to the claim of this plaintiff.

The grounds upon which I proceed are, that the agreement was one for the purchase of an interest in land, which was not reduced into writing so that its terms can be ascertained; that there was no part performance; and that the defendant sets up a totally different contract from that which is insisted upon

by the plaintiff, and claims the benefit of the Statute of Frauds.

I am, therefore, of opinion that the bill ought to be dismissed, and was properly dismissed by the vice chancellor, and consequently, that this appeal must be dismissed with costs.

GATEWOOD v. McLAUGHLIN.

(23 California, 178. Supreme Court, 1863.)

[1] **Parol sale of mining claim.** The right to a mining claim upon the public lands rests upon possession only, and a sale by parol by one in possession accompanied by a transfer of possession, transfers the title.

Appeal from the Sixteenth Judicial District, Calaveras County.

The facts are stated in the opinion of the court.

H. P. BARBER and WILLIAM S. WOOD, for appellant.

H. O. BEATTY, for respondent.

CROCKER, J., delivered the opinion of the court, NORTON, J., concurring.

This is an action to recover the possession of the undivided one fourth of a mining claim. Both parties claim under one Tyson; the plaintiff under a deed dated March 25, 1861, and the defendant under an alleged verbal sale and delivery of possession prior to that date, by Tyson to one McCabe, and by McCabe to one Harris, and by Harris to the defendant. On the trial, the defendant "offered to prove by good

[1] The doctrine that a parol sale of a mining claim by one in possession, accompanied by a transfer of possession, transfers the title, sustained in *Patterson* v. *Keystone Co.*, 13 M. R. 169, and *Goller* v. *Fett*, 11 M. R. 171. The rule, however, applies only to cases where the vendor is in the actual possession and can deliver it to the vendee: *Copper Hill M. Co.* v. *Spencer*, 3 M. R. 267. And it has no bearing when the interest held in the mining ground is considered as real estate: *Hardenbergh* v. *Bacon*, 1 M. R. 352. See note 14, 3 M. R. 415.

and competent evidence, to wit: by parol, that the plaintiff's grantor, prior to the conveyance made to the plaintiff, had sold his interest, being the interest in controversy, to one McCabe; that McCabe afterward sold to James Harris; that Harris sold to the defendant the identical interest sold to the plaintiff by Tyson, and that the grantors of the defendant went into the possession, and they and the defendant have held the possession thereof to the present time." To this the plaintiff objected that such parol transfer was void and not binding upon him, as he claimed under a deed duly acknowledged. The court sustained the objection and ruled out the evidence, and this is assigned for error.

In the case of the *Table Mountain Tunnel Co.* v. *Stranahan*, 20 Cal. 198, it was held that the right to a mining claim rested upon possession only, and did not amount to an interest in the land, and therefore was not within the Statute of Frauds; and that no conveyance other than a delivery of the possession was necessary to transfer the title from one person to another. And the court intimated a similar opinion in the case of *Jackson* v. *Feather River Co.*, 14 Cal. 22. Under these rulings, which we see no good reason for disturbing, the court clearly erred in rejecting the evidence offered by the defendant.

The judgment is therefore reversed, and the cause remanded for a new trial.

VINCENT ET AL. v. WATSON ET AL.

(18 Pennsylvania State. 96. Supreme Court, 1851.)

[1] **Assumption of the mine debts by the lessee.** A debtor leased to others certain furnaces and ore banks at a stipulated rent, and sold them the personal property at the works, the vendees to assume and pay whatever debts of the vendor due to the workmen, and to farmers and others, for provisions, the vendees might think proper, they to be allowed for the same. The vendees publicly assumed the said claims, and afterwards and before all such debts were paid, the plaintiffs, under a judgment for

[1] *Green* v. *Morrison*, 5 Colo. 18; *Carothers* v. *Connolly*, 13 M. R. 394; *Chicago Coal Co.* v. *Liddell*, 3 M. R. 126; *Belknap* v. *Bender*, 75 N. Y. 446; 31 Am. R. 476.

a balance of purchase money of real estate, had an attachment served upon the vendees, who were made garnishees: *Held*, that the vendees were bound by their agreement and assumption to pay such workmen and other creditors; and as their assumption was made before the service of the attachment, the money yet payable by them could not be attached by the plaintiffs to the prejudice of such creditors.

The creditors of the lessor might severally maintain suit against the lessees on their assumption to pay the claims of the former.

Error to the Common Pleas of Mercer County.

This was the case of an attachment execution issued by Vincent and Himrod against Irvin, defendant, and Watson & Whitaker, garnishees. The attachment execution was issued on 21st July, 1849. An agreement under seal, dated July 7, 1849, was entered into between Irvin and Watson & Whitaker, whereby Irvin leased to Watson & Whitaker certain furnaces, viz., the Hope and Perry, and Harry of the West, and ore banks, at a rent of seventy-five tons of pig metal yearly for each furnace, to pay only for time the Hope and Perry are in blast, which period is entirely optional with said Watson & Whitaker; and by the same agreement Irvin sold unto Watson & Whitaker all the personal property at said furnaces for $12,816, to be paid in pig metal; one fourth on May 1, 1850, like sum on November 1, 1850, like sum on May 1, 1851, and like sum on November 1, 1851; said Watson & Whitaker to collect all the debts due said Irvin at the Harry of the West, and to account to him for the same; also to enjoy the benefit of all advances made by the said Irvin to workmen on wood contracts, etc., and to account to him for the same, "*and to assume and pay whatever domestic debts or liabilities of said Irvin they may think proper, and to be allowed for the same.*"

The said Watson & Whitaker to enjoy the benefit of all contracts made at said furnaces for wood, etc., and to pay all debts and liabilities arising from the same, both past and future.

Said Irvin sells also 15 tons pig metal, for which Watson & Whitaker are to pay $20 per ton; five bags of coffee, three barrels of sugar, chest of tea and five kegs of powder, to be paid for, at cost and carriage, being in transit from Pittsburgh.

The plaintiffs here closed.

On the part of the defendants, testimony was given that after the contract was signed, Irvin gave instructions to pay the domestic creditors as soon as they could; also that defendants paid $1,190.16 before service of attachment, and $2,270 since; that Perry furnace was in blast but two months after July 7, 1849.

It was testified that before the service of attachment at the Harry of the West, Watson publicly assumed all the debts of the hands and the farmers throughout the country; the hands had quit work and gathered around the furnace; the amount of indebtedness of Irvin was $13,022; and that Watson & Whitaker were to pay the debts of the Perry furnace.

It was also testified that defendants, after the service of the attachment, paid off an execution in favor of Leech & Son which was issued in June, 1849, and had been levied on the personal property of Irvin, before the sale to Watson & Whitaker.

Defendants here closed.

On the part of the plaintiffs the court was requested to charge the jury "That the general assumption made by Watson, in the presence of Mr. Hanna, would not bind defendants, at least so far as regards those creditors who were not present, there being no consideration to support it."

The court charged the jury that by virtue of the contract defendants had the right to assume the payment of the debts of the said Irvin, and they did assume to pay the same, by the said Watson declaring publicly at the Harry of the West, that they assumed to pay all the debts of the hands and the farmers through the country; and that said assumption was binding upon them, even as to the creditors not present; and as such assumption was made before the service of said attachment, the plaintiffs are not entitled to recover.

Verdict was rendered for the defendants, Watson & Whitaker.

Error was assigned to the answer of the court to the plaintiff's point.

HOLSTEIN, for plaintiff in error.—It was contended that Watson & Whitaker had the privilege of assuming what debts of Irvin they thought proper, and until they did assume

the payment of such debts in such a manner as made them liable with creditors, they remained liable to Irvin and to the attachment. That the assumption made by Watson was not binding on Whitaker, even if binding on Watson, but that it was a mere *nudum pactum*, and not binding on either of them: 9 Barr, 229; 7 W. & S. 317; 3 Penn. Rep. 282; 1 Barr, 335; *Blymire* v. *Boistle*, 6 Watts, 182; *Hind* v. *Holdship*, 2 Watts, 104.

FETTERMAN, *contra*.—It was contended that the instructions by Irvin to Watson & Whitaker, and the subsequent assumption, was such an appropriation of the funds as precluded any other creditors from recovering them by an attachment execution. That such creditors could have maintained actions against Watson & Whitaker on this promise: 9 Barr, 529; 2 Watts, 104, *Hind* v. *Holdship;* 1 Sup. U. S. Digest 55, Sec. 11. See 1 Harris 50, *Esling* v. *Zantzinger*.

The opinion of the court was delivered Oct. 6, 1851, by CHAMBERS, J.

An execution attachment was issued on 21st July, 1849, on a judgment of the plaintiffs against William Irvin for $11,300, and served the same day on Watson & Whitaker, garnishees, attaching the rights of Irvin arising under an agreement between Irvin and Watson & Whitaker, made on the 7th of the same month. By that agreement Irvin leased to Watson & Whitaker for five years, two furnaces with the ore banks, at a rent of seventy-five tons of pig metal yearly for each furnace, to pay yearly and for the time they were in blast. By the same agreement Irvin sold to said Watson & Whitaker all the personal property at said furnaces for $12,816 to be paid in pig metal, payable in four equal payments extending to November, 1851, Watson & Whitaker to collect all the debts due said Irvin at one of the furnaces, and account to Irvin for the same; and they were to enjoy the benefit of all advances made by the said Irvin to workmen on wood contracts, etc., and to account for the same, "*and to assume and pay whatever domestic debts or liabilities of said Irvin they may think proper, and to be allowed for the same;*"

Watson & Whitaker to enjoy the benefit of all contracts made at said furnace for wood, etc., and pay all debts and liabilities arising from the same. There was also transferred to said Watson & Whitaker fifteen tons of pig metal, and a small amount of groceries in transit from Pittsburgh.

It was in evidence that Watson & Whitaker paid $1,190 before service of attachment, and $2,270 of the debts of Irvin, and also paid in the spring of 1850 a judgment of Leech, of Pittsburgh, for $1,950, on which execution had been issued before the sale. The Perry furnace was in blast but two months after 7th July, 1849. It was in evidence that before the service of the attachment, Watson, at the Harry furnace, publicly assumed all the debts of the hands and the farmers throughout the country; the hands had ceased work and collected round the furnace; and said also that he and Whitaker would pay the debts of the Perry furnace.

Irvin, at the time of making the agreement recited, was in failing circumstances and insolvent. The judgment of the plaintiffs for a large sum, being for a balance of purchase money of real estate, was nearly ready for execution. Irvin was no doubt desirous of providing for the payment of what was owing by him to the laboring men connected with the establishments, as well as the farmers of the neighborhood who had furnished provisions. Though this purchase may have been *bona fide* on the part of Watson & Whitaker, and the intentions of Irvin honest, yet the circumstance of his indebtedness, and an appropriation of his effects in a way that prefers one class of creditors to the postponement and prejudice of others, exposed this sale and agreement to strong legal exception.

This court is not called upon by the record to say whether, in their opinion, this sale and agreement are within the provisions of 13 Elizabeth, c. 5, in which conveyances by debtors to the end, purpose and intent to delay, hinder, or defraud creditors in the recovery of their debts, are declared fraudulent and void as against such creditors, or whether they are not in conflict with the act of assembly prohibiting preferences among creditors by way of assignment.

Statutes on this subject are entitled to and have received from the courts a liberal construction for the protection of

creditors, and to meet the schemes and devices by which a fair appearance may be given to that which is in reality collusive and illegal.

The plaintiff, by his proceeding to attach the funds of Irvin in the hands of Watson & Whitaker arising out of their contract, elected to treat such contract as valid and operative. It is affirmed and adopted to inure to the use of the plaintiff, so far as anything might be due or receivable by Irvin by virtue of its provisions. In the construction of this contract of sale, as between the parties to this action, it is to be considered free from all imputation of fraud, actual or legal. Irvin having sold his property to Watson & Whitaker at a price agreed upon, might agree to accept in payment of that price his liabilities to any debtors or any class of debtors. They are to assume and to pay whatever domestic debts or liabilities of said Irvin they may think proper, and to be allowed for the same. Watson & Whitaker were not limited in time in making these assumptions and payments, further, we think, than the time given for the payment of the purchase money by installments. At the issuing of the attachment execution in this case, but two weeks had expired from the date of their contract with Irvin. Watson & Whitaker were accountable to Irvin if they did not assume and pay to the creditors described, to the amount of their purchase money; and to the same extent they would be accountable to the plaintiffs, who, by their attachment, succeeded to the rights of Irvin for anything payable beyond the amount of such debts assumed.

The plaintiffs requested the court below to charge "That the general assumption made by Watson in the presence of Mr. Hanna would not bind defendants, at least so far as regards those creditors who were not present, there being no consideration to support it." The court answered this point by saying "That said assumption was binding on them even as to the creditors not present, and as such assumption was made before the service of said attachment, the plaintiffs are not entitled to recover. In this answer we do not perceive any error. The defendants had the right to defend on the assumption made and on the right to assume, since the service of said writ. All that Irvin would have the right to recover was the balance of any of the payments as they became due

that had not been appropriated to the class of creditors described, and the attaching creditor had no greater rights.

It is unnecessary to consider at length the point made in this court, that Watson & Whitaker were not bound on their assumption to creditors that would give to such creditors a right of action against them. In the opinion of this court they were bound as far as the consideration received would go. The creditors of Irvin might maintain an action on that assumption: *Beers* v. *Robinson*, 9 Barr, 229; *Hind* v. *Holdship*, 2 Watts, 104; *Arnold* v. *Lyman*, 17 Mass. 400

The error assigned not being sustained, the judgment of the court below is affirmed.

CAROTHERS v. CONNOLLY.

(1 Montana, 433. Supreme Court, 1872.)

[1] **Release of lien, good consideration for promise of assumption.** When a creditor agrees to assume the debt due to another creditor in consideration of such second creditor releasing his lien to the advantage of the security of the first creditor, such contract is not within the Statute of Frauds.

Appeal from the Second District, Deer Lodge County.

This action was tried in May, 1871, by a jury, who returned a verdict for Carothers, and the court, KNOWLES, J., entered judgment against Connolly.

The facts appear in the opinion.

The statute of the Territory, relating to the action, is as follows: "In the following cases, any agreement shall be void unless such agreement, or some note or memorandum thereof, expressing the consideration, be in writing, and subscribed by the party charged thereunto: First. Every agreement that by the terms is not to be performed within one year from the making thereof. Second. Every special promise to answer for the debt, or default or miscarriage of another."

SHARP & NAPTON, for appellant.

[1] *Vincent* v. *Watson*, 13 M. R. 388.

J. C. ROBINSON, for respondent.

WADE, C. J.

This suit is brought on an alleged promise by defendant to pay a debt of the plaintiff against the Key Stone Ditch Company, and it is claimed by defendant that this promise being a verbal promise to pay the debt of another is within the Statute of Frauds and therefore void.

The pleadings and the evidence in this case show substantially this state of facts: In the month of December, 1871, the Key Stone Ditch Company were indebted to the plaintiff and two other persons, doing business under the name and style of Carothers & Co., in the sum of $151.50, for lumber, before that time delivered to the ditch company at their special instance and request; that to secure the payment of this indebtedness Carothers & Co. filed a lien upon the ditch property on the 9th day of December, 1867; that in the year 1868, Carothers & Co., for a valuable consideration, assigned and delivered to the plaintiff their interest in said debt and lien; that prior to the 1st day of June, 1868, the defendant, Connolly, became the owner of the ditch property, or at least that he became the owner of a claim against the same in the sum of more than $5,000, and that while the defendant was so the owner of said property, or the owner of said claim against the same, in consideration that said plaintiff would give up, release and forfeit to said defendant his said lien upon said property, and that plaintiff would forbear to sue and foreclose the same, he, the defendant, then undertook and promised to pay plaintiff said debt and demand of $151.50, and that, in pursuance of said agreement of the defendant, the plaintiff did give up said lien, and did release the same to the defendant, and did forbear to sue and collect the same out of said property, and thereby lost his lien and claim against said property, and that his debt remains due and unpaid.

The testimony also shows that the defendant, being the owner of said claim against said property, was interested in having the other demands against said property paid off and canceled, and that for this purpose, and further to secure his own debt against said property, he had paid the claim of one

Volbrecht and of one Stephens thereon, and has taken a conveyance or assignment of said claims to himself.

Being thus interested in the ditch property to the extent of his claim or demand against the same, he makes the promise to the plaintiff as above set forth.

Is this promise, so made, within the Statute of Frauds, and void?

It is obvious from the situation of the parties and the property in question, at the time this promise was made, that the enforcement of the lien of the plaintiff, and the collection of his debt out of this property, would so far, and to the extent of the plaintiff's claim, have decreased and lessened the security of the defendant's debt, so that his promise and agreement to pay the debt of the plaintiff was a promise made for his own interest and for his own benefit, and to prevent a sacrifice of the property, by a forced sale, upon proceedings to foreclose plaintiff's lien. The promise and undertaking of the defendant, therefore, was not for the benefit of the plaintiff. The plaintiff's debt was secure beyond question, and this promise of the defendant was purely and solely for his own accommodation. It was made to further secure the defendant, and to place the ditch property under his sole control.

It was a promise to pay the debt of another, and not in writing, but the leading object of the promisor was to subserve and promote some interest or purpose of his own. Such a promise is not within the Statute of Frauds. The statute is designed to prevent frauds and perjuries, and not to engender them, and it would outrage every principle of justice and fair dealing to permit any defendant to escape the consequences of his promise, made to further his own interests, ends and purposes.

Wherever the main purpose and object of the promise is not to answer for another, but to subserve some purpose of his own, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing the liability of another.

If a creditor has a lien upon certain property of his debtor to the amount of his debt, and a third person, who also has an interest in the same property, promises the creditor to pay

the debt, in consideration of the creditor relinquishing his lien, this promise is not within the statute: 3 Pars. on Cont. §§ 24, 25; *Nelson* v. *Boynton*, 3 Metc. 396; *William* v. *Leper*, 3 Burr. 1886; *Alger* v. *Scoville*, 1 Gray, 391.

The judgment in the court below is affirmed.

O'DONNELL ADS. BREHEN.

(36 New Jersey Law, 257. Supreme Court, 1873.)

[1] **Void sale of sand.** The plaintiff made an agreement with the defendant to let him take the sand out of a pit fifty feet wide, the entire length, for the sum of $650, and gave him one year's time to take it out; the agreement was signed by the plaintiff and not by the defendant. *Held*, that the agreement was for the sale of an interest in land, and not having been signed by the defendant, is as to him, by force of the Statute of Frauds, void.

On rule to show cause why verdict should not be set aside.

Submitted on written briefs.

J. H. LIPPINCOTT, for the defendant.

JONATHAN DIXON, for the plaintiff.

DALRIMPLE, J.

When this case was before the court on demurrer, 34 N. J. Law, 408, it was held that the contract sued on, bound the defendant to pay for the sand sold, on delivery of the contract, and that the stipulation to pay and that to deliver were independent, the defendant being bound to pay for the sand on delivery of the contract, and could not resist an action for the purchase money on the ground that it was brought before the property sold was taken from the lots to which it was a part. The case now comes before the court on rule to show cause why the verdict which the plaintiff has obtained

[1] *Lacustrine Fer. Co.* v. *Lake Guano Co.*, 82 N. Y. 476; *Green* v. *Armstrong*, 1 Den. 550; *contra*, *Smith* v. *Bryan*, 5 Md. 141; 59 Am. Dec. 104; *Byasse* v. *Reese*, 4 Met. (Ky.) 372; 83 Am. Dec. 481.

for the whole contract price, less the payments made, should not be set aside and a new trial granted. It appears that the contract of sale on which the plaintiff relies, though in writing, is not signed by the defendant. It is as follows:

"Hudson City, January 1st, 1868. $650 contract. I to-day made the agreement with Edward O'Donnell, to let him take the sand out of the pit fifty feet wide, the entire length, for the sum of $650, and give him one year's time to take it out from the date above.

(Signed) EDWARD BREHEN, JR."

It seems to me quite clear, though there may be some conflict in the authorities bearing on the question, that this agreement is for the sale of an interest in lands, and not having been signed by the defendant, is, as to him, by force of the Statute of Frauds, void. In the case of *Tyler* v. *Bennett*, 5 A. & E. 377, it was held that a right to take water from a well is an interest in land, and in *Scorell* v. *Boxall*, 1 Younge & Jervis, 396, that a sale of growing underwood to be cut by the purchaser, gives an interest in land. It is settled in New York after considerable discussion of the point, that the natural produce of the earth is real estate, and *fructus industriales* are chattels, which may be sold by verbal contract, or on execution as personal property: *Green* v. *Armstrong*, 1 Denio, 551; *Warren* v. *Leland*, 2 Barbour, 614; *Pierrepont* v. *Barnard*, 5 Barbour, 364. There are cases, undoubtedly, where part of the land may, in contemplation of law, be severed from the remainder and become personal property.

It appeared on the trial of this case, that the defendant had paid for all of the sand taken. He contested the plaintiff's right to recover by virtue of the contract for that part of the sand not taken, and which it was alleged and proved the plaintiff had, by deed made subsequent to the contract, sold and conveyed, as part of his soil and freehold, to third parties. It is immaterial that the defendant took and removed the sand, pay for which is now claimed by the plaintiff, inasmuch as at that time the ownership of the property was in neither the plaintiff nor defendant, but in the plaintiff's grantees, to whom the defendant was accountable, and to whom he did account for all the sand taken after the deed to them was made by the plaint-

iff. The plaintiff is obliged to rely on his contract alone, and that not having been signed by the defendant, he is not liable thereon, and the rule to show cause must be made absolute.

The CHIEF JUSTICE and Justices BEDLE and SCUDDER concurred.

MAYER v. CHILD ET AL.

(47 California, 142. Supreme Court, 1873.)

Stock contract void under Statute of Frauds. A contract to sell and deliver at a future day mining stock (price $1,350) when no part of the stock is delivered, no part of the purchase money paid, and no note or memorandum of the sale or transaction made or signed by the parties, is void under the Statute of Frauds.

The assignment of a contract void under the Statute of Frauds does not constitute a good consideration for a promise to pay.

Appeal from the District Court, Nineteenth Judicial District, City and County of San Francisco.

May 28, 1872, the plaintiff, through his broker, S. Lacour, made a verbal contract with Klopenstine, by which Klopenstine was to sell him 100 shares of Pioche mining stock for $1,350. Afterward Lacour assigned this verbal contract to the defendants by the following instrument:

"I hereby assign and sell to Child & Tibbey, the 100 shares Pioche stock sold by J. Klopenstine to me, May 28th, 1872, and due July 27th, 1872, for the sum of thirteen hundred and fifty dollars ($1,350), they to give me fifteen hundred dollars July 27th, 1872."

In consideration of the above assignment, the defendants executed to Lacour the following agreement:

"We, the undersigned, Child & Tibbey, agree to pay to L. Lacour fifteen hundred dollars on the twenty-seventh day of July next, 1872, in consideration of his assignment of this date of 100 shares of Pioche, sold by J. Klopenstine to said L. Lacour, on the twenty-eighth day of May, 1872, and to be delivered on the twenty-seventh of July, for the sum of

thirteen hundred and fifty dollars. We agree, furthermore, that in case of the delivery of the stock by said J. Klopenstine on or before said date, or a settlement by Klopenstine at the rate of $40 per share, or more, to account five hundred dollars more to L. Lacour—altogether two thousand dollars—the five hundred dollars subject to the said eventualities, and the fifteen hundred dollars to be counted to L. Lacour, whatever happens.

(Signed) "CHILD & TIBBEY.

"July 11, 1872."

Lacour assigned said agreement to the plaintiff, for whom he had acted in the transaction, by the following indorsement thereon:

"I hereby assign the above to J. Mayer, or order, the purchase of Klopenstine having been made for him.

(Signed) "L. LACOUR.

"July 12, 1872."

Mayer brought this action to recover the $1,350. Klopenstine did not deliver the stock to Lacour, nor did Lacour deliver it to defendants. Defendants recovered judgment in the court below, and the plaintiff appealed. The other facts are stated in the opinion.

MORGAN & HEYDENFELDT, for appellant.

There was a sufficient consideration to support the agreement upon which this action is based. It was a doubtful right. there was a legal possibility that the contract assigned to them could be enforced and prove a benefit: *Sherman* v. *Barnard*, 19 Barb. 302.

PARKER & ROCHE, for respondents, also relied upon *Sherman* v. *Barnard*, *supra*.

BY THE COURT.

The contract between Lacour and Klopenstine was for the purchase of 100 shares of mining stock for the sum of $1,350. No part of the stock was delivered, nor was any portion of the purchase money paid, nor was any note or memorandum of the sale or transaction made or signed by any person.

Under our Statute of Frauds, the contract was void, and its assignment to the defendants furnished no consideration for the promise declared on: *Sherman* v. *Barnard*, 19 Barb. 291.

Judgment affirmed.

SEARIGHT ET AL. v. PAYNE ET AL.

(2 Tenn. Ch. 175. The Court of Chancery of Tennessee, 1874.)

[1] **Parol promise by stockholder to pay corporate debt.** Where goods are sold and credit given to a corporation, an officer and stockholder can not be held personally liable for the debts thus created, upon a promise to pay or see them paid, unless such promise be in writing.

[2] **Assertion of corporate solvency creates no personal liability.** An officer and stockholder of a corporation who states to a creditor that the corporation is, in his opinion, solvent, does not thereby make himself liable to the creditor, if the statement was made in good faith, although the corporation was in fact at that time insolvent.

Supply store by corporation—Shareholders' liability. A mining corporation may, under its general charter, keep a supply store out of which to pay its employes in kind, instead of money, and the fact that it sells these goods by retail to third persons is no ground for holding the stockholders liable as partners even if such sales be *ultra vires*.

THE CHANCELLOR (COOPER).

The Phœnix Manufacturing Company was established in 1867, with a two-fold object—one to manufacture pig iron at Worley Furnace, in Dixon county, the other to work up the product of the furnace into machinery and castings of various kinds, at a foundry and machine shop in Nashville. It continued in existence until about May, 1868, when, having previously sold the foundry property at Nashville, it was merged in the Worley Furnace Company. This was accomplished by valuing the property, real and personal, of the Worley Furnace, as owned by the Phœnix Company, deducting the indebtedness of the latter company, charging off $10,000 of the residuum to profit and

[1] *Miller* v. *Mickel*, 9 Colo. 331.

[2] *Banta* v. *Savage*, 7 M. R. 113.

loss, to cover accrued interest on the real estate notes, and to provide for any depreciation and other contingencies, and taking the balance, $47,000, as a basis for the stock subscription to the new company. The Worley Furnace Company was chartered by the legislature on the 27th of February, 1868, with all the powers and privileges, etc., of the Tennessee Manufacturing Company. This latter company was chartered with the right "of employing its capital and credit in any industrial, mechanical, or manufacturing pursuit it may deem advisable," and to receive and hold such real, personal, and mixed property, "as it may deem expedient for conducting its operations." The capital stock of the Worley Furnace Company was fixed at $51,450, the charter of the Tennessee Manufacturing Company requiring a subscription of $50,000 to authorize an organization. The amount thus fixed was, upon the opening of the books, subscribed by seven persons, of whom the defendants, Payne, Trenbath, McCrory, and Foster's intestate, Nash, were parties. Of this sum $47,000 was paid in the property of the Worley Furance, valued as aforesaid, and the residue was paid, if paid at all, in money. The corporation thus organized elected Nash president and Payne secretary, and went into operation in May, 1868, and continued business until the 28th of April, 1870, when it made a deed of trust of all its property for the benefit of creditors, giving a preference to the claims of the laborers for wages. The creditors filed bills, and the trust property was sold and only paid the preferred wages and the balance of unpaid purchase money for land, leaving the general creditors, including the complainants, unpaid.

The business of the corporation was properly the making of pig iron, but in carrying on its operations it was found necessary to keep what is called a supply store, in which a stock of merchandise, such as is usual in country stores, was kept to supply the hands employed, and doubtless other persons who chose to buy.

In conducting this part of the business, purchases were made from various mercantile firms in Nashville, and among others, from complainants. The purchases were made in the name of the corporation, and the charges made to it on the books of the merchants, including complainants, and the

accounts closed from time to time by notes of the corporation. The credit was, according to the accounts and notes and all the parol proof, given to the Worley Furnace Company as a corporation. That company, although its operations were carried on at the furnace in Dixon county, kept its books by a competent book-keeper at Nashville, a fact well known to the complainants and other merchants. The purchases of goods from the complainants seem to have been made exclusively by Payne, as secretary of the company. He admits that he always represented the fact, as he honestly thought it was, that the corporation was solvent and would be able to pay its debts. The same representations were probably made by Nash. Neither of them ever gave a statement in writing or otherwise, so far as appears, of the financial condition of the company at any one time, nor were they, or either of them, asked for such a statement. Nor does it appear that complainants ever examined the books of the company or asked permission to examine them. They were content with general assurances of solvency.

Large payments were from time to time made on the complainants' claims, leaving still due the several amounts mentioned in the bill. The complainants seem, also, to be assignees of other claims of the same character.

The present bill is filed for the purpose of holding the defendants individually liable for the balance due upon these purchases of goods, on various grounds, which may be thus arranged:

1st. That they promised to pay or see said claims paid.

2d. That they have not paid up their subscriptions of stock.

3d. That they had fraudulently represented the corporation as solvent when, in fact, it was insolvent.

4th. That the defendants were not incorporated for the purpose of merchandising, and that to the extent of their purchase of goods, they were merely partners.

5th. That the whole concern was a fraud and a swindle, and the charter a mere cloak and no protection.

The allegation of the bill that the defendants promised to pay the complainants' debt themselves, is expressly denied by the answer, and not sustained by the proof. The testimony of

the complainants themselves shows that the sales were made, and the credits given exclusively to the Worley Furnace Company as a corporation. Any promise by the defendants to pay such a debt would be within the Statute of Frauds, and must be in writing to be binding.

The attempt to charge the defendants for unpaid subscription of stock is put an end to by the plea of a former suit pending, and the ruling of the court upon it. That point can not be made in this suit: See *Searight* v. *Payne*, 1 Tenn. Ch. 186.

The allegation of the bill that the defendants, or any of them, had fraudulently represented the corporation to be solvent when, in fact, it was not, is denied by the answers, and not sustained by the proof. That the defendant Payne did assure the complainants that the company was, in his opinion, solvent, is admitted by him. There is, perhaps, no competent evidence of any such assurance by Nash, and no evidence at all that either of the other defendants ever made any representations on the subject. That the corporation was actually insolvent, and perhaps from its very commencement, if its debts had come down upon it at any one time, is, I think almost certain. But there is not the least pretense for charging the defendants, or either of them, with wilfully misrepresenting its condition, or making any statement in regard to it other than what he thought, at the time, was substantially true. Payne, who is really the only man properly amenable to the complainants on this ground of relief if any one be amenable, showed his faith by his works, and is by far the heaviest loser in the whole business. It was simply a mistake on his part, as is so often the case with sanguine men in large enterprises.

The weight of authority, both English and American, is that third persons, not parties to the contract, should only be responsible for statements known by them to be false, or made in bad faith—at any rate where the statements are expressly, or from their very nature, matters of opinion: *Collins* v. *Evans*, 5 Q. B. 820; *Rawlings* v. *Bell*, 1 C. B. 951; *Moens* v. *Heyworth*, 10 M. & W. 147; *Taylor* v. *Ashton*, 11 M. & W. 401; *Tryon* v. *Whitmarsh*, 1 Metc. 1; *Russell* v. *Clark*, 7 Cr. 69; *Lord* v. *Goddard*, 13 How. 198. And this

doctrine has been applied to cases where the alleged misrepresentations were made by directors of a corporation touching its solvency: *Jackson* v. *Tarquand*, Law Rep. 4 H. L. 305; 10 M. & W. 147; 11 M. & W. 401.

The record develops on this point a state of facts of every-day occurrence in the period in which these events transpired. Men entered into schemes of speculation fostered by the prevailing high prices, and hoped on until their fortunes were wrecked by the continued fall in values; and the merchant and farmer furnished supplies, and trusted to the same chances that were misleading all parties. The means of accurately ascertaining the condition of the Worley Furnace Company were open to the complainants, but they preferred to trust the sanguine assurances of its officers rather than take the trouble of investigating for themselves. It is entirely an afterthought, not warranted by the facts, to charge those officers with a willful and fraudulent perversion of the truth.

The defendants were certainly not incorporated for the purpose of carrying on the ordinary business of a merchant. Nor do I think that the charter, broad as it is, authorized the corporation to conduct a common country store. But it clearly had a right to purchase supplies for its own employes, and pay them their wages in such supplies instead of money. The complainants sold to them as a corporation for such purposes as were legitimate and proper. If the corporation violated its charter by going further, that was a matter between it and the State, with which the complainants had nothing to do. The corporation had a legal existence, and the complainants, having traded with it, can not now change their own contract. If there had been no corporation at all the question would have been altogether different: *Barrow* v. *Nashville & T. P. Co.*, 9 Humph. 304; *Crutcher* v. *Nashville Bridge*, 8 Humph. 403.

The last, and to judge from the elaborate argument of one of the learned counsel of the complainants, the main ground of the bill, is that the whole concern was a fraud and a swindle, the charter a mere cloak, and the stockholders liable as individuals. This position has been lengthily argued, and warmly pressed upon the court. But I am unable to find the least warrant for it in the proof. The complainants' own proof

utterly fails to show any fraud whatever. The entire reliance, in the argument submitted, was upon the facts developed by the defendants' testimony. I have not thought it necessary to follow the learned counsel in the line of argument pursued. Suffice it to say that upon a careful reading of the entire record, after having previously heard it read in open court, I am of opinion that the corporation was organized, and the business entered upon and conducted, in the utmost good faith; that the complainants themselves were fully aware of the fact that its stock consisted of the property of the Worley Furnace, and that the work was conducted in the usual way, in the expectation of eventually becoming profitable; and that they had at all times the means of ascertaining for themselves the exact condition of the corporation. They have suffered loss in the transaction, but so have the stockholders themselves, and to a far larger amount. There is no just ground whatever for the attempt to make these stockholders individually liable.

The bill must be dismissed, with costs.

1. Possession necessary to exempt parol license of mine from Statute of Frauds: *Anderson* v. *Simpson*, 9 M. R. 262.

2. Statute, how pleaded: *Bean* v. *Valle*, 13 M. R. 292; *Beard* v. *Converse*, 2 M. R. 670.

3. Sale of *shares* of the Mining Co. of Ireland, *held*, to be a sale of an interest in lands within the statute: *Boyce* v. *Greene*, 1 Batty, 608.

4. Contract for making brick on land of another, when not within the statute: *Brown* v. *Morris*, 3 M. R. 177.

5. Parol license to mine—how avoided when licensee is in possession: *Bush* v. *Sullivan*, 9 M. R. 214.

6. A parol contract for a new lease between landlord and tenant, *held*, to be within the Statute of Frauds: *Crawford* v. *Wick*, 8 M. R. 541.

7. Facts amounting to sufficient part performance, to take the case out of the statute: *Miller* v. *Ball*, 64 N. Y. 286.

8. Application of the statute to contracts for the purchase of land by one person for the benefit of another: *Bayles* v. *Baxter*, 14 M. R. —.

9. Although trusts must be proved by writing, it may be subsequent to the creation of the trust: *Forster* v. *Hale*, 5 Ves. 308.

10. Parol agreement to construct ditch enforced after part performance: *Gooch* v. *Sullivan*, 5 M. R. 14.

11. Agreement for the sale of growing timber, when within the statute: *Huff* v. *McCauley*, 9 M. R. 268.

12. Dower in mines may be assigned by parol: *Lenfers* v. *Henke*, 5 M. R. 67.

13. Prospecting contract not within the statute: *Hirbour* v. *Reeding*, 11 M. R. 514; *Murley* v. *Ennis*, 12 M. R. 360.

14. Parol contract for sale of mine, without part performance, void: *Kelly* v. *Ruble*, 4 Pac. 593.

15. Damage for breach of contract in violation of the statute, limited to actual expenditure on the faith of it: *McCafferty* v. *Griswold*, 99 Pa. St. 270.

16. A license to take cinders from a cinder dump is not a contract concerning land: *Smart* v. *Jones*, 15 C. B. N. S. 717.

17. The relationship as mining partners between the parties, with actual possession, takes a verbal contract to convey an interest in the claim, out of the statute: *Southmayd* v. *Southmayd*, 4 Mont. 101.

18. Oral contract to buy real estate with one's own funds, and hold in trust for another, is invalid: *Donohoe* v. *Mariposa Co.*, 5 Pac. 495; or to allow a party to pay for an interest in a claim to be purchased: *Dunphy* v. *Ryan*, 116 U. S. 491.

19. Where a writing is once proved plaintiff can not fall back on a parol sale: *Terpening* v. *Holton*, 12 Pac. 189.

20. Draft drawn for purchase money by agent for an anonymous principal treated as sufficient memorandum to escape the statute: *Neaves* v. *North State M. Co.*, 90 N. C. 412; 47 Am. R. 529.

21. Contract to cut timber and make it into charcoal, not within the statute: *Puget Sound Iron Co.* v. *Worthington*, 2 Wash. 472.

[1]STEPHENSON v. WILSON ET AL.

(37 Wisconsin, 482. Supreme Court, 1875.)

Title in trespass quare clausum. If plaintiff can not show actual and exclusive possession of the land, but is obliged to rely upon his legal title, he must show a *valid* title.

Idem—Tax title claimant, not an intruder. In trespass *quare clausum fregit*, when defendant claims title under a tax deed, although if plaintiff were the holder of the original government title, defendant's right of action against him on the tax deed would be barred by reason of plaintiff's occupancy during parcel of the three years next after recording the deed, still, as to the acts performed by him, having claim of title and right of possession under his tax deed, defendant can not be treated as a mere wrong-doer or intruder, but he may question the sufficiency of plaintiff's title, and require him to make strict proof of it.

Deed of bounty land prior to patent, void. Where land was located under a military land warrant issued under the act of Congress of May 6, 1812, a deed of it executed prior to the issue of patent is invalid.

[2]**Adverse possession by mining.** If, during a part of the three years next after the recording of a tax deed, the former owner of the land, by himself, his agents or tenants, openly occupy it for mining purposes, the acts of mining not being merely occasional, fugitive and desultory, but as continuous as the nature of the business and customs of the country permit or require, this will be such an adverse possession as will interrupt the running of the Statute of Limitation in favor of the tax title claimant.

Appeal from the Circuit Court for Iowa County.

Action for trespass *quare clausum.*

The complaint avers the plaintiff's ownership in fee of a quarter section of mineral land in Iowa county, and that he, his grantors and those under whom he claims, had been in possession since July, 1847, and in the usual form alleges a trespass *quare clausum* thereon by the defendants, Oct. 23, 1871, their threats to continue such trespass and to dispossess the plaintiff, and to collect rents from the miners at work thereon, and demands judgment for damages, injunction, etc. The answer of defendant Wilson sets up title under a tax deed

[1] Overruling *Sydnor* v. *Palmer*, 29 Wis. 253, where the court doubted whether mining could constitute adverse possession; approved in *Wilson* v. *Henry*, 1 M. R. 157.

[2] *Colvin* v. *McCune*, 1 M. R. 223; *Williams* v. *Pomeroy Co.*, 6 M. R. 195.

issued Feb. 3, 1868, to one Moffett, upon the tax sale of 1858, and recorded the day of its issue; that the lands were then vacant and unoccupied, and so continued until about Jan. 1, 1870; that Moffett conveyed to Wilson, April 15, 1868; that Stephenson, the plaintiff, commenced an action Jan. 12, 1870, to recover possession of said premises against defendant Wilson; that, in his complaint therein, Stephenson alleged that Wilson was in, and unlawfully withheld possession from him; that he, Wilson, answered said complaint denying the same, except the allegation that he was in possession, which he admitted; that he relied upon the admission of his possession by the allegation in said complaint and did not bring suit against the plaintiff, and was ready to try the issue in said action; that Stephenson after three years and eight months from the issue and recording of said tax deed, withdrew his suit; that defendant was the exclusive owner, and had been in the actual and peaceable possession of the premises since January, 1870, and at the time of the alleged trespass, was engaged in making improvements thereon; and that Oct. 21, 1871, several men, at the instance of the plaintiff, Stephenson, broke and entered the premises and erected a shanty thereon, to his damage, etc. The plaintiff replied, alleging that his grantors and himself had been in the actual, peaceable, open, continuous possession of the premises since the year 1834, mining, cutting feed and hay thereon, denying that the claimants under said tax deed had ever obtained possession, or attempted to do so until Oct. 23, 1871, when, first having obtained an injunction restraining the plaintiff from interference, they entered *vi et armis* and drove plaintiff's agents therefrom, but never obtained possession; and that defendants are barred by the Statute of Limitations. On the trial the plaintiff, to establish his title, offered in evidence a certified copy of a patent of the premises in question, issued by the United States to one Tuttle, Sept. 3, 1847, under the act of Congress of May 6, 1812; and the record of a power of attorney given by said Tuttle to Lyons & Henn to apply for and take out said patent and convey the lands, which power was executed at Washington, D. C., June 24, 1846, and purported to have been acknowledged that day before two justices of the peace, whose official character was certified by the Secretary

of State of the United States; but the signatures of the justices were without seals, and the certificate did not state that the justices knew said Tuttle, or that his identity was proved, for which reason the defendant objected to said power of attorney being received, and the objection was overruled. The record of a deed from said Tuttle, by Henn, one of his attorneys in fact, to Paschal Bequette, dated Sept. 1, 1847, acknowledged Sept. 2, 1847, and recorded Sept. 20, 1847, was also offered in evidence. The defendants objected on the ground that the deed had been executed prior to the issuance of the patent, and was therefore void. The objection was overruled, the deed read, and the record of a deed from Bequette to one Collier, and a copy of the probate of Collier's will, and a deed from the trustees therein appointed and empowered, to Stephenson, were also read; and the plaintiff also offered in evidence the tax receipts showing that he, and those under whom he claims, had paid taxes on the land since 1853, except for the year 1857. John Vingo, a witness for the plaintiff, testified that he was put in possession of the land by Henry, agent of the plaintiff, and was empowered to collect dues or rent from the miners who were mining on the land; that he collected rent from them in 1867, 1869 and 1871; that a number of miners worked thereon at various times and paid him rent; that he let one person cut hay on the land; that any one could dig on the land by paying the rent, and that it was a custom for miners to leave work in summer and come back in winter; that most of the diggings were from six to twenty feet deep. The depositions of A. C. Dodge, Adele Dodge and Paschal Bequette were read to the effect that they had seen the original power of attorney, above mentioned, and that it had been lost.

A motion for non-suit was denied. The defendant offered in evidence the tax deed to Moffett and Moffett's deed to Wilson; also the record of the suit mentioned in his answer, in which the complaint, dated Jan. 10, 1870, alleged that the defendant (Wilson) unlawfully (then) withheld possession of said premises from the plaintiff. The plaintiff then offered as a witness one Poynette, who testified that he had mined on the land under Bequette, and afterward under permission from Henry and Vail, agents of Stephenson, in 1868 and 1871; that he had

also worked some on the land for Wilson; that he had paid rent to Vail, Henry and Vingo. Other evidence was offered of the same purport. Henry, agent of the plaintiff, testified that he had been agent since 1858; had collected rent of miners in 1869, 1870 and 1871. The defendant Wilson also testified that he had leased the land to miners and received rent therefor in 1870 and 1871.

The instructions are sufficiently stated in the opinion. Verdict for plaintiff. Motion for new trial denied, and defendant appealed.

A. WILSON, M. M. COTHEREN and W. E. CARTER, for appellant, argued that until plaintiff established a *prima facie* title, it was unnecessary for defendants to show any title: *Brown* v. *Pinkham*, 18 Pick. 172; 1 Hill on Torts, 601 and note The use and occupation for mining does not constitute adverse possession under the statute: *Sydnor* v. *Palmer*, 29 Wis. 227; *Wilson* v. *Henry*, 35 Id. 241; *Dupont* v. *Davis*, Id. 631; *Doolittle* v. *Tice*, 41 Barb. 181. The deed from Tuttle to Bequette was void: U. S. Stat. at Large, Vol. 2, 729; 3 Id. 287; 5 Id. 497. Evidence of adverse possession is to be strictly construed, and every presumption made in favor of the true owner: *Timm* v. *Bear*, 29 Wis. 262; *Haag* v. *Delorme*, 30 Id. 591; *Lewis* v. *Disher*, 32 Id. 507.

HENRY & SMITH, for the respondent, contended that the tax deed under which defendant claimed was void; that the doctrine of *Sydnor* v. *Palmer* did not here apply; that that case placed too strict a construction on the statute; that the words "ordinary use of the occupant" in the statute, R. S. 1858, Ch. 138, Sec. 7, Subd. 3, may, with great reason, be deemed mining use, as mining lands are thus ordinarily used, and are rarely susceptible of other use. From the testimony, they argued that the constructive possession of Wilson under his tax deed was entirely defeated by the possession of Stephenson as proved.

COLE, J.

We shall not attempt to consider all the exceptions pre-

sented by the record and discussed by counsel, but will mainly confine our attention to questions arising upon some portions of the charge of the court which were excepted to, and are claimed to be erroneous.

The circuit court, among other things, charged the jury that the plaintiff must be regarded as the true owner, in other words, as being invested with the original government title, notwithstanding any technical defects or objections which had been found or raised to his title, or to some of the conveyances or transfers which constituted his chain of title; that the defendant's sole connection with the title, or his interest in the land on which the trespass was committed, was founded upon the tax deed offered in evidence under which he claimed, and that he did not challenge the title of the plaintiff except as he attempted to show title in himself under that deed; and that the plaintiff must be regarded as the owner of the original title, at least till the tax deed was executed and recorded.

In giving this charge the learned circuit judge doubtless intended to adopt, and seems to have adopted and followed the views and language of this court as contained in the opinion in the case of *Wilson* v. *Henry*, 35 Wis. 241, and he must therefore be absolved from all responsibility for any error which it may contain. That it is erroneous, when considered with reference to this action and the claims of the parties, we can not doubt. The action is for trespass *quare clausum*. Both parties claim title to the land, and both parties claim to have had actual possession when the alleged trespass was committed. And though the gravamen of the complaint is for an injury to the plaintiff's possession, yet it is entirely clear that by the pleadings the right or title to the property was put in issue, and was the real important question contested on the trial. In order to support the action, the plaintiff deemed it necessary for him to show that he was the rightful owner of the land, and that his possession had been wrongfully invaded by the defendant. He relied on a paper title derived from the general government through various mesne conveyances, and entry and possession under his deed. The land was not inclosed, and there is a dispute as to who had the actual occupation and possession. The plaintiff did not choose to rest his

right to recover upon the ground that he was in the actual, visible and exclusive possession, but saw fit to raise the question of title, and attempted to show that he was the real owner. Hence he offered in evidence the various conveyances constituting his chain of title. The defendant sought on the trial, and to some extent was allowed to challenge the sufficiency and validity of these conveyances; and we are clearly of the opinion that he was in a position to take advantage of any defects in them. It is true the defendant claimed title and possession under a tax deed. He claimed to be the true owner, to have the superior title, the possession and the right of possession. It seems to us it is incorrect to say he stands in the position of a wrong-doer, or a mere intruder, having no right to assail or question the title of the plaintiff.

He may question the sufficiency of that title, may show if he can, by competent evidence or valid legal objections, that there are defects in those conveyances, that the plaintiff is not the true owner, and never became invested with the original government title. Nor do we see any ground for making presumptions in favor of the plaintiff's title. He must show that he has the legal title, and also must prove an injury to his possession by the defendant, in order to recover. It is evident the cause was tried upon the theory that it was essential for the plaintiff to establish these facts as a part of his case, and the court so told the jury, and then neutralized and destroyed the effect of this direction by giving the incorrect charge already referred to. The plaintiff must prove a right of property and lawful possession in himself, which the defendant has disturbed. Did he do so?

The land in question was located by one Abraham Tuttle, in pursuance of a land warrant issued to him for military services. The warrant was issued to Tuttle in pursuance of the act of Congress of May 6, 1812, and was located under the act approved July 27, 1842. (Sec. 2 U. S. Statutes, p. 728; 5 Id. p. 497.) The land was conveyed (under a power of attorney given by Tuttle to Wm. C. Lyons and Bernhardt Henn) to Paschal Bequette, the deed bearing date September 1, 1847, before the patent issued. The admission in evidence of the record of the power of attorney was objected to on the ground

that the instrument was not entitled to be recorded, the acknowledgment being insufficient; but the court overruled the objection, and admitted the record for the purpose of establishing a proper basis of proof of title in the plaintiff. An attempt was likewise made to prove the loss of the original power of attorney and its contents by parol testimony, which evidence was objected to. But all the exceptions arising on this part of the record we decline to consider or express any opinion upon, and come directly to the question in respect to the deed. It is claimed by the defendant, inasmuch as this conveyance was executed prior to the issuing of the patent, that by the acts of Congress it is void, and passed no title. If this view is correct, it must work a reversal of the judgment. For we have already said that if the plaintiff recovers at all in the action, he must do so on the strength of his own title, and that the defendant was in a position where he could challenge or take advantage of any defect in that title. Was, then, the deed executed by the attorney in fact of Tuttle to Bequette, in violation of the acts of Congress touching the sale of bounty lands, void because it was made before the patent issued?

This precise question was presented to the court in the case of *Nichols* v. *Nichols*, 3 Chand. 186, and received an affirmative answer. It was there held that, by the act of May 6, 1812, and the several acts subsequently passed relating to military bounty lands, the beneficiary was prohibited from assigning or transferring any claim thereto until after the patent for the land issued. It is obvious that this case is decisive upon the question as to the invalidity of the deed, unless we decline to follow the construction there placed upon the acts of Congress. It is, however, insisted by the counsel for the plaintiff, that the authority of the case should be disregarded, because the reasoning by which the court reached its conclusions is not clear and satisfactory, and because the doctrine of the case has been virtually overruled in *Dillingham* v. *Fisher*, 5 Wis. 475, and *Maxwell* v. *Moore*, 22 How. 185. In *Dillingham* v. *Fisher*, the question before the court was, whether a pre-emptor who had paid his money and obtained the register's certificate of purchase, could sell and convey his interest in the land before the patent issued to

him, or whether the pre-emption laws prohibited such a sale. It was held that the prohibition only prevented a sale of "the right of pre-emption" given by the act, and did not forbid or restrict the pre-emptor from assigning and transferring his interest in the land after he had paid for it. The case is only valuable, as touching the one before us, in showing that courts will not, by construction, enlarge a restriction upon the right to free alienation of property, and that the prohibition must clearly apply. That is doubtless a sound rule, but it is not necessarily in conflict with the decision in *Nichols* v. *Nichols*.

In *Maxwell* v. *Moore* the question was whether the prohibition in the act of 1812 was engrafted upon and became a part of the act of May 22, 1826 (4 U. S. Statutes, p. 190), which allowed a soldier, who had a patent for bounty lands in the Territory of Arkansas, which turned out to be unfit for cultivation, and who had removed for actual settlement on the land, to relinquish such land and surrender his patent and select a like quantity elsewhere in the land district. Neither the act of 1826, nor any of the subsequent acts extending it, contained any restriction whatever against alienation. The court held that the acts of 1812 and 1826 had no necessary connection, and that there was no good reason why the soldier, who had removed to Arkansas and inspected his tract of land then patented and alienable, should not have the right to contract to convey the tract he might get in exchange. The act of 1826 was said to be plain on its face and single in its purpose, and the court refused to imply a restriction where Congress had made none. It is obvious that this case and that of Nichols may well stand together.

As an original question, it is by no means clear that the construction placed upon the acts of Congress in *Nichols* v. *Nichols* is not the correct one. It must be conceded that a limitation exists in the act of 1842 against the alienation of the certificate of location by the beneficiary. But it is said that this was not intended to restrict the right of the beneficiary to make an executory contract for the sale of the land which he had located. If the only object of this prohibition was to prevent a sale and transfer of the certificate of location, leaving the holder at liberty to dispose of his interest in

the land at pleasure, there would not seem to be much need for or use in the provision. For, if the soldier can by contract, executed or executory, dispose of all his equitable interests in the land before the patent issues, the restriction is of doubtful utility. But the object of the restriction doubtless was to protect the soldier, and to prevent him from selling his interest and title in the land before the patent issued. Whether wise or unwise, there are strong grounds for holding that this was the original purpose and design of the prohibition. However this may be, since the question was decided in *Nichols* v. *Nichols* that the soldier is prohibited from assigning or transferring his interest in the land before the patent issues, we are disposed, without further remark, to adopt and follow the construction then placed upon the acts of Congress upon this subject. Should the Supreme Court of the United States give a different interpretation to these statutes, we should then feel at liberty to review the correctness of that decision. It follows from these views, that the plaintiff's title was defective and that the deed from Tuttle to Bequette, having been made and acknowledged prior to the issuing of the patent, did not transfer to the grantee any title. And, as no presumption can arise that the plaintiff was invested with the original government title, except as he derived it through that deed, the injurious tendency of the charge above referred to upon the defendant's case becomes apparent.

Upon this branch of the case we take occasion to remark that we have examined the case of *French* v. *Spencer*, 21 How. 228, but find nothing in it which militates against the conclusion at which we have arrived.

The counsel for the plaintiff, moreover, insist that this deed, together with other documentary evidence offered, was competent, as furnishing a basis of adverse possession for ten years, and also for applying the three years limitation against the tax deed. Upon this branch of the case the court, in substance, instructed that notwithstanding the plaintiff was to be regarded as the owner of the title derived from the government, yet that the tax deed divested him of that title from the time it was recorded, unless the plaintiff could show that he or his agents had been in possession of the land the

whole or some part of the time, within three years next after the date and record of the tax deed. Further, that if the jury should find from the evidence that the land had been wholly unoccupied by the plaintiff or his agents or tenants for the entire term of three years next after the recording of the tax deed, he could not recover, but might recover providing it appeared that for any part of the three years he had been in possession. Also that, if the plaintiff, by himself, or his agents or tenants, openly occupied the land and mined thereon for the purpose of obtaining lead ore, for any part of the three years, this would bar the title under that deed, and that if the land was open for mining to all miners who might choose to occupy it for that purpose, paying the customary dues, the occupancy of such miners should be regarded as the occupancy and mining of the plaintiff; but if the land was vacant and unoccupied by any person under the authority, permission or consent of the plaintiff or his agent, then their verdict should be for the defendant.

The first clause of this charge is open to the criticism passed upon it by the defendant, namely, that it assumes a material fact as proven; in other words, that the plaintiff was to be regarded as the owner of the original government title. But aside from this it seems to be substantially correct. It is claimed by the defendant that no possessory acts by the owner of the character referred to in the instruction will break the continuity of that possession which arises on the record of the tax deed. Hence he insists that the use and occupation of land merely for mining purposes, or other operations carried on beneath the surface not connected with the ordinary use and cultivation of the soil, is not such a use and occupation as constitutes adverse possession against his title, providing it is shown that he has been possessed of the land for any time within the three years after the record of the deed. That mining operations upon land, or its possession for the purposes of mining, would constitute an effective adverse possession as against the tax deed, was decided in *Wilson* v. *Henry*; indeed, that was the real question which was involved in the case. The defendants there, among other things, proposed to show that from 1858 to the commencement of the action, during the mining season of each year, from two to ten

miners had constantly worked and mined for lead ore upon the land, such miners being usually farmers working their farms during the summer season and mining during the winter season; such miners so working upon the land under verbal leases from Henry, acting as this plaintiff's agent, they paying rent to Henry; also, that a custom exists where this land is situated, making it obligatory upon the land owner to hold mineral diggings for the miner operating them during the summer season, though the miner did not work during such summer season upon such diggings; also that the mining for said period upon the land was mostly near the surface of the ground, and in open cuts, so as to be plainly visible to all; also that occasionally a miner worked upon the land under this plaintiff during said time in the summer season; also that certain named persons were tenants of this plaintiff, mining upon the land at the time they became tenants of this defendant, etc. This proposed testimony was ruled out, and its exclusion was held to be error. It was said that the facts, if established, would divest the holder under the tax deed of all constructive possession, and effectually turn the three years limitation against him, by showing possession and actual occupancy on the part of the former owner. And indeed it is difficult, upon principle, to see any reason why this should not be so.

For surely the carrying on of mining operations upon lands, the digging and carrying away of ores and minerals taken therefrom, are as unequivocal acts of ownership and possession as the cultivation of the soil or raising of crops thereon, and there is no reason why they should not be held to be an interruption of the constructive possession which follows the recording of the tax deed. This court has said that in order that the claimant by tax deed may assert or acquire title to unoccupied land by lapse of time under the statute, it must appear that the land remained and was unoccupied continuously for the whole period during which the statute was running; and that any intervention or actual occupancy during the time by the former owner, or of any person for him, disengages the bar of the statute and relieves the former owner from the conclusive effect which would otherwise be given to the tax deed: *Lewis* v. *Disher*, 32 Wis. 504; *Wilson* v. *Henry*,

supra. And there is no reason why the use and occupation of land for mining purposes and for carrying on mining operations beneath the surface should not be effectual to destroy the constructive possession under the tax deed. It may be difficult to lay down any precise rule as to the extent to which such mining operations should be carried on to have that effect; but should the facts be established, which it was proposed to show in *Wilson* v. *Henry*, we should deem them sufficient for that purpose. In *Jones* v. *Collins*, 16 Wis. 594, where there was a constant conflict and contest for the possession, this court said the former owner was not dispossessed by the record of the tax deed. And therefore we think that acts of mining and digging for lead ore upon the land—acts which are not merely occasional, fugitive and desultory, but are as continuous and constant as the nature of the business and customs of the country permit or require, do amount to such an assertion of ownership and possession as will interrupt the running of the statute in favor of the tax deed. It is said that it is only the ordinary use and cultivation of the soil for the purposes of agriculture, which constitutes adverse possession under our statute. See Ch. 22, Laws of 1859, Secs. 32–4, and Sec. 7, Ch. 138, R. S. The provisions of the Revised Statutes doubtless, in the main, relate to the cultivation and use of the land for purposes of husbandry. It is natural that this should be so, because agriculture is the leading industry of the country, the great basis of its wealth, and the majority of the laboring population are deeply interested in the matter of the settlement of titles of farming lands. But we do not think it was the intention of the statute that the use of the land must be for agricultural purposes alone in order to constitute adverse possession. There are lands which are wholly unfit for cultivation, but which contain rich and extensive lodes of mineral. Mining is an important branch of industry, and it is essential that titles to mineral lands be settled, as well as other titles. And we should be unwilling to say that the actual occupation and possession of land for mining purposes would not constitute adverse possession as much as the cultivation of the soil or raising crops thereon. And, where the original owner continues in the actual occupancy and possession of the land for mining purposes for any part

of the three years after the tax deed is recorded, this must be regarded as such a possession as will drive the claimant under the tax deed to his action to prevent the bar of the statute. When the extent of the mining operations comes up to the offers of proof which this court considered in *Wilson* v. *Henry*, we are clear that this result must follow.

In *Sydnor* v. *Palmer*, 29 Wis. 228, the court, in considering the question as to what is the character or requisite of the possession, or what acts will make the possession adverse under Sec. 7, Ch. 138, throws out the remark, that it is clear the provision relates and is intended to apply only to the use and occupation of land for the purposes of husbandry; and that the use and occupation of the land for the purpose of digging mineral, or for other works and operations beneath the surface and not connected with agriculture or the ordinary use and cultivation of the soil, would not present a case for the application of the statute. This remark was unnecessary for the decision of the case, and it is so stated in the opinion. Still the defendant relies upon it more or less to sustain the construction of the statute for which he contends. In the broad sense in which the language is used or is attempted to be applied, we think the remark needs qualification. The doctrine of the case of *Sydnor* v. *Palmer* was not supposed to be in conflict with that of *Wilson* v. *Henry* by the chief justice, who wrote both opinions, nor did the other members of the court understand that it was.

There were a number of other points discussed in the case, but we confine our opinion to the questions above noticed.

By the Court.—The judgment of the circuit court is reversed, and a *venire de novo* awarded.

VAN BOKKELEN ET AL. V. COOK ET AL.

(5 Sawyer, 587. Circuit Court, District of Nevada, 1879.)

Fraudulent administration—Equity jurisdiction. A federal court, as a court of equity, has jurisdiction to call an administrator to account, who has defrauded the estate in the course of his trust, notwithstanding the probate court which appointed him has passed a decree finally settling his accounts and discharging him, the fraudulent acts not having been raised therein.

Administrator must account for foreign assets—Situs of mining stock. Shares of mining stock are assets in the hands of an administrator appointed in Nevada, the shares having come into his lawful possession, although the corporation exists by virtue of the laws of California, and he may be required to account for them in Nevada.

Suit by assignee of chose in action. Since the act of Congress of March 3, 1875, an assignee of a chose in action can prosecute an action concerning it, if founded in tort, without regard to the citizenship of the assignor.

Persons who have no real interest to be affected by a decree, and against whom no decree is asked or can be made, are not necessary parties to a suit.

Plea of the statute. Where a bill alleges a fraudulent transfer of stock by an administrator, and his final discharge, but alleges a want of knowledge of the fraud until "long after the discharge," it does not appear from the bill that the action is barred by the Statute of Limitations.

Questions upon United States statute reserved. The constitutionality and proper construction of that portion of the act of March 3, 1875, which confers original jurisdiction upon the circuit courts of all suits "in which there shall be a controversy between citizens of different States" not decided.

Decree in absence of unnecessary party. An heir and distributee is a proper party in a suit to recover assets against the former administrator, but if the court is able to proceed to a decree, and do justice to the parties before it without injury to absent persons, it will do so.

Before Mr. Justice FIELD, SAWYER, Circuit Judge, and HILLYER, District Judge.

On demurrer to the bill. The opinion sufficiently states the case.

McALLISTER & BERGIN and H. K. MITCHELL, for complainants. S. M. WILSON and W. S. WOOD, for defendants.

By the Court, HILLYER, J.

[1] *Dow* v. *Gould & Curry Co.*, 31 Cal. 651; *Thornburgh* v. *Savage M. Co.*, 7 M. R. 667.

This is a suit on the equity side of this court, in which the complainants, heirs of one Jacob L. Van Bokkelen, seek to compel the defendants to account for certain mining stock alleged to have been fraudulently disposed of by them. Both defendants are sued in their personal capacity, but the bill charges the fraudulent acts to have been done while the defendant Daniel Cook was administrator of the estate of said Jacob L. Van Bokkelen, the defendant Derby acting in concert and collusion with him.

The defendants demur to the bill on several grounds, which will be briefly considered.

1. Jurisdiction of the subject-matter of the suit is denied to this court. It is alleged in the bill that the defendant Cook was administrator of the estate of said Jacob L. Van Bokkelen; that, as such, he filed his final account in the District Court of Storey County, Nevada, a court having probate powers; that his account was settled and he finally discharged before this suit was begun.

The question thus raised is, whether this court has jurisdiction to call an administrator to account who has, in the course of his trust, defrauded the estate, notwithstanding the probate court which appointed him may have passed a decree finally settling his accounts and discharging him. That the court has this jurisdiction we think can be satisfactorily shown. The frauds charged in this bill are not shown to have been investigated or passed upon by the probate court, but to have been concealed from that court; and it would indeed be against conscience, and a subversion of justice, if an administrator, while confessing a fraudulent management of the assets of the estate under his care, could successfully plead in bar of a suit like this, by the defrauded heirs, the final settlement of his account by the probate court.

If we allow to that settlement the same conclusiveness ordinary judgments have, yet it would, as between the administrator and the heirs, be voidable like other judgments for fraud. This is no direct proceeding to vacate the decree of final settlement, but a suit brought for the purpose of charging the defendants personally for a fraudulent appropriation to their own use of a portion of the estate of the deceased Van Bokkelen.

We have been referred to many cases sustaining, but none denying, to a court of equity, jurisdiction of such a case.

If an executor be called to account for misconduct, he can not improve his situation by a fraudulent settlement with the probate court, showing a full administration of the estate, when in reality a large portion of it, not received by the distributees, remained in his hands: *Speed* v. *Nelson*, 8 B. Mon. 499. So one distributee may exhibit a bill in the circuit court to obtain her share of an estate, charging the administrator with gross misconduct, with making false settlements with the probate court, with keeping back a true inventory of the property in his hands, and with using the money of the estate for his private gain, such bill having for its object relief against these fraudulent proceedings, and the compelling a true account of administration: *Payne* v. *Hook*, 7 Wall. 425.

It appeared from the bill in that case that the administrator had not yet made his final settlement, and that the administration was still in progress, but the court held that the bill stated a case for equitable relief, "according to the received principles of equity," and that the complainant was not bound to resort to the probate court to correct the errors and frauds in the accounts of the administrator.

The present bill charges the defendant, Cook, with making a fraudulent inventory, causing a fraudulent assessment, sale and purchase of the stock, in collusion with Derby, rendering a false account of the stock to the court, and with managing and controlling the stock as his and Derby's own, thereby making large profits; and seeks to compel the administrator and his confederate to account for the stock, and the profits made by its management. This bill, like that in *Payne* v. *Hook*, we think states a case for equitable relief, "according to received principles of equity." Courts of equity have from early times exercised a concurrent jurisdiction with courts of law in matters of the administration of assets. A reading of the statements in the bill will make it apparent that the frauds in this case can not be adequately redressed at law. There must be an account taken of the stock and of the profits made by the various operations stated in the bill, and this can only be efficiently done in equity.

The fraud is itself a ground of equity jurisdiction. There is, in addition, the jurisdiction which exists in courts of equity to enforce constructive trusts, and to all these "mixed considerations" the jurisdiction is properly referable: Story's Eq. Juris., Sec. 534.

2. It is claimed that, because the corporation was a California corporation, the stock had its actual *situs* in that State, was never assets in the hands of the administrator in Nevada, and that he could not, therefore, have committed any *devastavit* or fraud upon it.

The shares of mining stock being personal property, they are regarded in law as having no *situs*, or a movable one, which is always the domicile of the owner. The deceased, Jacob L. Van Bokkelen, being domiciled, at the time of his death, in Nevada, the title of his administrator to all his personal property is perfect, whether found in California or elsewhere; and, while the administrator could not have sued in California and recovered possession of this property without there taking out auxiliary letters of administration, if it came into his possession by a voluntary delivery, it came lawfully, and he may be required to account for it as assets in this jurisdiction: *Wilkins* v. *Ellett*, 9 Wall. 740. In accordance with this view it is held to be the duty of an administrator to place on his inventory all the property of his intestate, and he should include goods situated in another State: *Estate of Butler*, 38 N. Y. 397.

The title of the administrator to the whole, wherever situated, is good, and although his letters do not confer upon him any authority to sue in another jurisdiction, if he make an assignment his assignee may sue there without taking out letters: *Harper* v. *Butler*, 2 Peters, 239. The foundation of the rule that an administrator can not sue in a foreign jurisdiction is a regard for the creditors and distributees residing there. The disability is confined to the person, and does not extend to the subject-matter: *Peterson* v. *Bank*, 32 N. Y. 46. In this case it does not appear that there are any creditors or distributees in California, from whence the assets in question come, and there appears to be no shadow of ground upon which the administrator, Cook, can stand to deny his liability to account here for the property received by him in California.

3. The bill shows an assignment by two of the heirs to one of the complainants, but does not show the citizenship of the assignors, and the objection is made that the bill must show that the citizenship of the assignors was such as would have given the court jurisdiction, had they sued. Section 629 of the Revised Statutes is cited in support of this objection. Since the adoption of that section, however, the act of March 3, 1875 (18 St. 470), has been passed, which materially changes the former law in respect to the matters upon which this objection is based.

Section one of that act contains the following clause: "Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless the suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law-merchant and bills of exchange." By the former law, section 629, all choses in action, whether founded on contract or tort, except foreign bills of exchange, were embraced. Now, as the extract just given shows, an assignee can prosecute an action founded on a tort without regard to the citizenship of the assignor. This suit is not founded on contract, and consequently the jurisdiction depends upon the citizenship of the party on the record, whether he be assignee or original owner of the claim on which suit is founded.

4. It appears, from the face of the bill, that a portion of the stock which is alleged to have been the property of Jacob L. Van Bokkelen, and to have been fraudulently assessed and sold, stood on the books of the company in the names of W. H. Watson, A. J. Grant and Sol. Simpson, and that the defendant Cook well knew that this stock was the property of said J. L. Van Bokkelen. The defendants claim that this shows that Watson, Grant and Simpson are necessary parties to this suit, because the legal title to the stock was in them, and a conversion of that very stock is alleged. It is not seen how this shows these persons to be necessary parties. No transfer of the stock is sought, nor can any interest they may have in it be affected by the decree in this suit. The contest in respect to the right to the stock is between the complainants, and the defendants Cook and Derby. According to the face of the

bill, Watson, Grant and Simpson have no real interest to be affected by the decree. No decree is asked and none can be made against either of them. Their presence, then, is wholly unnecessary.

5. It is claimed that, as appears from the bill, the act of inducing the assessment and sale of the stock and the purchase and issuing of new certificates all occurred in California five years before the filing of the bill, and therefore any cause of action which might have existed is barred by the Statute of Limitations. The statute of Nevada bars an action for relief on the ground of fraud in three years from the discovery of the fraud. Upon an obligation or liability incurred out of the State, the bar is two years, nothing being said about discovery in case of fraud. It is unnecessary to determine at this time whether this cause of action arose in California, or whether it is such an obligation or liability as the law contemplates. The bill does not show on its face at what time the fraud was discovered. It is alleged that the decree of final discharge was made March 6, 1876, and that the complainants had no knowledge of the frauds until "long after the decree of final discharge."

The bill was filed February 4, 1879. It is not necessary to state in a bill the facts which take the case out of the statute: *Mandeville* v. *Wilson*, 5 Cranch, 15. Independent of the statute of Nevada, the cause of action in this suit on the general principles of equity jurisprudence, did not "accrue" until the discovery of the fraud: *Bailey* v. *Glover*, 21 Wall. 342. It can not, therefore, be said that the bill shows on its face that the suit is barred, whether we apply the three or the two years limitation.

6. The only remaining question relates to the joinder of Mary E. Von Kleuze, and the failure to join Minnie Van Bokkelen as a party. The allegation of the bill as to the citizenship of Mary E. Von Kleuze, is that she is a citizen of the United States, at present residing in the kingdom of Bavaria. Minnie Van Bokkelen is an heir, and entitled to share in the distribution of the estate. The bill should have mentioned the State in which Mary Von Kleuze last resided. Her citizenship of that State continues, notwithstanding her present residence in Bavaria. But if we assume that she is a citizen

of the same State as that of some of the defendants, which is the most favorable position for the defendants, the objection to her joinder then involves a decision upon the constitutionality and proper construction of that portion of the act of Congress of March 3, 1875, which confers original jurisdiction upon the circuit courts of all suits "in which there shall be a controversy between citizens of different States."

Upon a suggestion of the presiding justice, that a case involving the precise question is now before the Supreme Court of the United States, set down for argument at the ensuing October term, this point was not discussed upon the argument before us. The question being a jurisdictional one, can be raised at any time hereafter, should the Supreme Court decide against the jurisdiction. We therefore overrule the demurrer on this point, without expressing any opinion upon it at this time. In regard to the non-joinder of Minnie Van Bokkelen, there is this to be said: She appears from the bill to be an heir and distributee. She is therefore a proper party, but upon the authority of *Payne* v. *Hook*, 7 Wall. 425, she is not an indispensable party. If, as was said in that case, the court is able to proceed to a decree, and do justice to the parties before it without injury to absent persons, it will do so. The real object of the present suit is the collection of assets of the estate of the deceased Van Bokkelen, alleged to have been wrongfully appropriated by the defendants to their use. The suit can proceed for this purpose without any injury to the rights of absent heirs. If assets are recovered, all entitled to share in them may be allowed to come in for that purpose, or their rights can be fully protected by the decree. This disposes of all the objections.

The demurrer is overruled, with costs, and the defendants are required to answer the bill on or before the next rule day.

ATKINSON v. THE AMADOR AND SACRAMENTO CANAL CO.

(53 California, 102. Supreme Court, 1878.)

[1] **Amending complaint can not affect the statute as to land not originally included.** In an action for damages to farming lands, caused by debris from hydraulic mining, the plaintiff filed an amended complaint counting on damages for injuries to lands not mentioned in the original complaint. *Held*, that the filing of the original complaint did not prevent the Statute of Limitations from running as to the trespass on the lands not therein mentioned.

Appeal from the District Court of the Sixth Judicial District, Sacramento County.

The action was brought to recover damages to plaintiff's farming lands, caused by the debris from the defendant's hydraulic mining operations. The defendant, a corporation, was engaged in hydraulic mining from 1871 to 1877. A large stream of water was used by the defendant night and day to wash down the gravel banks of the mining ground, and the tailings were carried off by means of flumes down a hill, flowing upon the plaintiff's lands and covering up valuable portions thereof with stones, gravel and mud, to a depth of several feet, thereby rendering it unfit for agriculture. The plaintiff's land, before he acquired it, had been subdivided into several parcels or "ranches," all of which was known as the Clark Ranch. The original complaint, filed March 30, 1875, did not include the Clark Ranch in the description of the land injured by the debris. An amended complaint was filed January 3, 1877, including the Clark Ranch, and counting on damages for injuries committed three years prior to the filing of the original complaint. To this amendment the defendants pleaded the three years Statute of Limitations (Code of Civil Procedure, Sec. 338, Sub. 2), and at the trial the court was requested by the defendant to give the instruction quoted in the opinion, but refused. The jury returned a verdict for the plaintiff in the sum of four thousand dollars

[1] *Smith* v. *Bellows*, 12 M. R. 157; *Kille* v. *Ege*, Id. 654.

and judgment having been rendered accordingly, the defendant appealed.

W. C. BELCHER, HAYMOND & ALLEN and BENJ. BULLARD, JR., for appellant, cited *Lawrence* v. *Ballou*, 50 Cal. 264; *Anderson* v. *Mayers*, 50 Cal. 525.

A. P. CATLIN, HENRY EDGERTON, H. O. BEATTY and TUBBS & COLE for respondent.

BY THE COURT.

Among other instructions asked by the defendant and refused by the court, was the following: "The jury, in estimating all damages done to the land known as the Clark Ranch, must exclude from consideration any damage or injury done prior to the first day of January, 1874. Whatever injury was done before that time can not be recovered in this action."

The original complaint was filed on the 30th day of March, 1875, but in that complaint no cause of action founded upon injuries alleged to have been done to the "Clark Ranch" was set forth. In the amended complaint filed January 3, 1877, the injury alleged to have been done by the defendant to that ranch was for the first time counted upon, and damages therefor claimed. The amended complaint, in so far as it counted upon the injury done to that ranch, was the introduction of a new cause of action, against which the defendant had the right to plead, and did plead, the Statute of Limitations. In view of this plea upon the record, the plaintiff, in adducing the evidence in support of his case as to the "Clark Ranch," should have confined himself to proof of injuries, if any, done since the third day of January, 1874; and had he done so, the giving of the instructions refused would not have embarrassed the jury in finding a verdict for such damages as had been shown. However this may be, the instruction as asked was correct in point of law, and should have been given to the jury.

Judgment and order reversed, and cause remanded for a new trial. Appellant to recover but one half the costs upon this appeal.

TOOMBS, Respondent, v. HORNBUCKLE, Appellant.

(3 Montana, 193. Supreme Court, 1878.)

Action for continued injury not prevented by appeal pending. The pendency of an appeal from an action concerning the diversion of water does not prevent the bringing of new actions for continued diversion, nor is the Statute of Limitations suspended by the appeal. If plaintiff delay action for more than the statutory period, the original case standing in the meantime on appeal, he can not recover beyond the statutory period.

Damages beyond statutory period. Where the damages allowable during years not barred by the Statute of Limitations have been assessed along with damages accruing during a period which was protected by the statute, so that the court can not segregate one from the other, the error necessitates a reversal of judgment.

Appeal from Third District, Meagher County.

This action was tried before WADE, C. J., who refused the motion for a new trial.

CHUMASERO & CHADWICK, and SHOBER & LOWRY, for appellants.

WOOLFOLK & PORTER, and E. W. TOOLE, for respondent.

BLAKE, J.

The respondent commenced this action July 16, 1875, to recover damages for the wrongful diversion of water by the appellants in the years 1870, 1871, 1872, 1873 and 1874. Evidence relating to the acts of the parties during these years was offered and submitted to the jury, and judgment was entered on the verdict for the respondent for $3,000. A decree was entered in the district court April 21, 1870, for the respondent, for the water in dispute. The appellants appealed therefrom to this court July 28, 1870, and executed the statutory undertaking to stay the execution of the judgment. The decree was affirmed by this court January 16, 1871, and the appellants appealed to the Supreme Court of

the United States and executed another undertaking to stay the execution of the judgment. The decree was re-affirmed and the remittitur on the judgment was issued from this court to the court below January 8, 1875. The case is reported in 1 Mon. 286, and 18 Wall. 648. The complaint in this action alleges that the appellants have diverted said water since April 21, 1870.

We intend to consider only one question: the effect of the Statute of Limitations of the Territory upon the rights of the parties. The appellants maintain that the respondent can not sue for any damages which were caused by their acts more than two years before the commencement of this action. The respondent contends that he could not institute this suit while the appeals were pending, and the proceedings upon the judgments were stayed by the undertakings or bonds. The act concerning "Limitations" provides that an action for waste or trespass upon real property, and an action for relief not otherwise provided for, shall be commenced within three years after the cause of action shall have accrued: Cod. Sts. 516, § 8; 517, § 9.

There is no clause in this act which restricts the right of the respondent to bring an action to redress the wrongs complained of during the pendency of the appeals in the original case. The appeals and undertakings affect the subject of that action, but can not extend beyond it. When the appeal to this court was perfected, "all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein," were stayed: Civ. Pr. Act, § 386. The same results followed the appeal to the Supreme Court of the United States. The sections that have been cited must receive a general construction, and courts can not create any exceptions where the law-making power has made in one: *M'Iver* v. *Ragan*, 2 Wheat. 25; *Demarest* v. *Wynkoop*, 3 Johns. Ch. 146; *Tynan* v. *Walker*, 35 Cal. 634, and cases there cited. The case at bar must be governed by the sections of the Statute of Limitations, *supra*.

It was formerly held that an injunction staying the commencement of an action did not suspend the running of the Statute of Limitations, or relieve a party from its operation: *Barker* v. *Millard*, 16 Wend. 572. The court says: "No

case was cited, nor have I met with any, where it was held that an injunction out of chancery would suspend the running of the statute." This wrong was remedied by the enactment of a law similar to that in force in this Territory, which is as follows: "When the commencement of an action is stayed by injunction or a statutory prohibition, the time of the continuance of the injunction or prohibition shall not be a part of the time limited for the commencement of the action." Cod. Sts. 518, § 16; *Wilkinson* v. *First N. F. I. Co.*, 72 N. Y. 499. The statute provides further that "no person shall avail himself of a disability unless it existed at the time his right of action accrued." Cod. Sts. 518, § 17. There is no order of court or provision of law, which prohibits the respondent from bringing an action to recover the damages for the wrongful diversion of the water at the times when his right so to do accrued. If there had been such an order, or statutory prohibition, the time during which the disability existed would not prevent the running of the Statute of Limitations, unless the legislative assembly excepted the same in express terms.

The law considers that the continuance of the wrongful diversion of the water by the appellants is a new cause of action, or a new nuisance: *Staple* v. *Spring*, 10 Mass. 72; *Baldwin* v. *Calkins*, 10 Wend. 157; Angell on Lim. (5th Ed.) § 300. Successive actions may be brought so long as the appellants continue to divert the water: *Bare* v. *Hoffman*, 79 Pa. St. 71. In *Carpentier* v. *Mitchell*, 29 Cal. 330, it appeared that the plaintiff was entitled to the rents and profits of a tract of land which had been the subject of controversy a number of years, and recovered a judgment for the same; but the Supreme Court disallowed the amount which was found due beyond the time limited for the commencement of the action. We are satisfied that the respondent can not recover any other damages than those which were caused by the acts of the appellants within three years before the bringing of this action. The jury included in the assessment of damages the sum that was payable to the respondent for the diversion of the water in the years 1870, 1871 and 1872. We have no means of ascertaining this amount and can not modify the judgment. The court erred in entering the judgment on the verdict and refusing to grant the motion for a new trial.

Judgment reversed.

1. A bill for an account of ores was amended seven years after filing: *Held*, that the Statute of Limitations was no defense, although if originally brought at the time of amendment it would have applied: *Grubb's App.*, 79 Pa. St. 120.

2. In cases of amendment (the cause of action being the same) the statutory period must have elapsed before the date of action begun—not the date of amendment: *Smith* v. *Bellows*, 12 M. R. 157.

3. The Statute of Limitations does not begin to run until wrong is done or right withheld: *McBee* v. *Loftis*, 3 M. R. 222.

4. Holding under color of title not necessary to constitute a bar under Iowa Statute; it is sufficient if the holding be under claim of right: *Colvin* v. *McCune*, 1 M. R. 223.

5. Account for coal taken by underground mining limited to six years: *Dean* v. *Thwaite*, 1 M. R. 77; *Williams* v. *Pomeroy Co.*, 6 M. R. 195.

6. Upon a claim for damages for breaking plaintiffs' barriers and working their coal, the statute only begins to run from the time of the discovery of the wrongful act: *Ecclesiastical Com.* v. *North Eastern R'y*, 12 M. R. 609.

7. Trespass in digging iron ore upon school lands not barred until five years after the trustees holding the land have authority to sue: *Greene Township* v. *Campbell*, 16 Ohio St. 11.

8. When the statute begins to run, as between co-tenants: *Huff* v. *McDonald*, 14 M. R. —.

9. To a plea of the statute in an action for the wrongful taking of coal, the plaintiff replied that the taking was fraudulently concealed during the statutory period: *Hunter* v. *Gibbons*, 1 H. & N. 459; see *Williams* v. *Pomeroy Co.*, 6 M. R. 195.

10. Foreign corporation can not plead the statute in Nevada: *Barstow* v. *Union Co.*, 10 Nev. 386; *Robinson* v. *Imperial Co.*, 10 M. R. 370; *contra*, *Sutro Tunnel Co.* v. *Seg. Belcher Co.*, 7 Pac. 271.

11. The statute begins to run from the maturity of the debt; not from the date of the instrument: *Bassett* v. *Monte Christo Co.*, 4 M. R. 108.

12. The benefit of the statute allowed, although not pleaded: *Gottschall* v. *Melsing*, 1 M. R. 667. The same as to *laches* in equity: *Lakin* v. *Sierra Buttes Co.*, 25 Fed. 337.

13. The statute does not run against a Mexican grant until the confirmatory patent issues: *Reed* v. *Spicer*, 4 M. R. 330.

14. As to when a statute begins to run against rent in favor of the assignee of the lessee, see *Ruppel* v. *Patterson*, 1 Fed. 220.

15. A purchaser in possession holds by color of title, which under the statute will ripen into a perfect right: *Harris* v. *Equator Co.*, 12 M. R. 178.

16. Actions based on fraud must be brought within three years after its discovery: *Bradbury* v. *Davis*, 3 M. R. 398.

17. The benefit of the statute claimed by co-tenant against co-tenant: *Susquehanna Co.* v. *Quick*, 1 M. R. 201; *420 M. Co.* v. *Bullion Co.*, 11 M. R. 608; *Huff* v. *McDonald*, 14 M. R. —; *Union Co.* v. *Taylor*, 5 M. R. 323.

18. When the statute begins to run on note payable out of mine: *Wolf* v. *Marsh*, 3 M. R. 204.

19. The statute, although it began to run before issue of patent, is broken by the issuance of the patent: *Nessler* v. *Bigelow*, 60 Cal. 98; *King* v. *Thomas*, 12 Pac. 865.

20. There can be no adverse possession by shaft outside of boundaries of claim: *Pardee* v. *Murray*, 4 Mont. 234.

21. Five years' user gives title to water right: *Ellis* v. *Tone*, 58 Cal. 291. To same effect: *Brown* v. *Ashley*, 16 Nev. 312; *Cox* v. *Clough*, 11 Pac. 732.

22. Completely covering land by tailings does not amount to adverse possession: *Woodruff* v. *North Bloomfield Co.*, 18 Fed. 755.

23. There can be no color of title without an instrument purporting to carry title nor in the case of a squatter who knows he has no title: *Deffeback* v. *Hawke*, 115 U. S. 392; *Sparks* v. *Pierce*, Id. 408. A party following his vein outside of his side lines has not color of title: *Lebanon Co.* v. *Rogers*, 5 Pac. 661; 8 Colo. 34.

24. As to when amendment will be allowed to plead the statute, see *Morton* v. *Bartning*, 9 Pac. 146; 68 Cal. 306.

ADDERLY V. STORM ET AL.

(6 Hill, 624. Supreme Court of New York, 1844.)

[1] **In determining who are stockholders,** the court will not inquire beyond the legal title, except where there has been a fraudulent transfer.

Collateral holder of stock liable for company debts. In 1837, one B., being indebted to the defendants, transferred to them certain stock in the Rossie Galena Company, delivering the certificates and assigning them upon the books of the company. By contemporaneous writing the defendants were authorized to dispose of the stock at a certain rate, and apply the proceeds in payment of B.'s debt as it became due, but if the debt was paid before the stock was disposed of, they were to return it. The debt was paid in September, 1838, whereupon the certificates were returned, indorsed with a power of attorney, for the re-transfer of the stock. This power being deficient, a more formal authority was afterward given, but the re-assignment was not made either upon the books of the company or otherwise until March, 1840: *Held*, that the defendants were stockholders, and liable for debts contracted by the company in January, 1840.

Idem—Unregistered transfer. It might have been otherwise, had the defendants re-assigned the stock to B., on receiving payment from him, although no transfer had been made on the books of the company.

The defendants were sued as stockholders of the Rossie Galena Company for a debt which the company owed the plaintiff, he having recovered a judgment against the company, on which execution had been issued and returned unsatisfied. (See Charter, Stat. of 1837, p. 445, §§ 9, 10.) The cause was tried in July, 1843, before WILLARD, Circuit Judge, at the St. Lawrence Circuit. The plaintiff's demand was a note made by the company for $52.77, dated January 16, 1840. In August, 1837, B. T. Nash & Co. were indebted to the defendants in the sum of $1,107.28, for which Nash & Co. gave their three promissory notes payable in five, six and seven months from that time. At the same time J. C. Bush, one of the firm of Nash & Co., transferred six shares of his stock on the books of the company to the defendants, and delivered to the defendants the usual certificate for the six shares. On receiving the certificate, the defendants gave Bush a receipt, stating that they had received the six shares of stock, which they were to dispose of at any time for $200 per share, and apply the funds to the payment of the three notes of Nash

[1] *People* v. *Robinson*, 64 Cal. 373; *State* v. *Pettineli*, 12 M. R. 513.

& Co.; or if not sold when the notes should be paid, they were to return the scrip to Bush, or account for it. The last of the notes was paid in September, 1838. Soon afterward the defendants returned the scrip to Bush with a written indorsement authorizing his son to transfer the stock. Bush supposed the transfer had been made; but he afterward learned that the authority given to his son was not deemed sufficient. He then got a more formal power from the defendants, by which G. W. Shepard was authorized to make the transfer This was dated the 10th of December, 1839; and Shepard made the transfer on the books of the company, as the attorney for the defendants, on the second March, 1840. The judge decided that the defendants held the stock in the nature of a pledge, and were not stockholders within the meaning of the statute; that they gave the order for the re-transfer of the stock before the plaintiff's debt was contracted, and afterward had no interest in the stock whatever. A non-suit was therefore ordered, to which the plaintiff excepted; and he now moved for a new trial on a bill of exceptions.

R. H. GILLET, for the plaintiff.

M. T. REYNOLDS, for the defendants.

By the Court, BRONSON, J.

By the charter, the stockholders are made, jointly and severally, personally liable for the payment of the debts of the corporation: Stat. of 1837, p. 445, §§ 9, 10; and under a like provision in relation to the Rossie Lead Mining Company we held that the liability was upon those who were stockholders at the time the debt was contracted: *Moss* v. *Oakley*, 2 Hill, 265. So far as any question appears to have been made on the trial, the plaintiff's debt was contracted at the time the note bears date, which is January 16, 1840. At that time the names of the defendants stood on the books of the company as the owners of six shares of the stock, though they had previously ceased to have anything more than the formal title. The debt, for the security of which they held the stock, was fully paid in 1838, and the scrip or certificate was

returned to Bush, with an informal power to re-transfer the stock. On learning that the authority was defective, the defendants executed another and a sufficient power in December, 1839; but the transfer was not actually made until after the plaintiff's debt was contracted.

Before the notes of Nash & Co. were paid, I can not doubt that the defendants were stockholders within the meaning of the statute, and answerable as such to the creditors of the company. They did not receive the stock as a pawn or pledge, for the whole legal interest was vested in them, and they might sell and transfer the property at pleasure. They not only stood as owners on the books of the company, where, by the charter, the stock was made transferable (§ 7), but they had the usual evidence of ownership in a certificate signed by the president and secretary of the corporation. If we could look beyond the legal title, and notice the equitable interest, the case would not be materially changed. By the receipt which the defendants gave to Bush, they had the right to dispose of the stock at any time; though before the notes of Nash & Co. fell due, they were restricted to a particular price. After the notes became due, they could sell at the market value. I may add that they held the stock for a sum which greatly exceeded both its nominal and actual value. But it is enough that they clearly had the legal title to the stock, which they took, so far as third persons are concerned, with all the rights, and subject to all the liabilities, which that title could confer or impose.

After the notes of Nash & Co. had been paid, and the defendants had given a power to re-transfer the stock to Bush, the question is one of more apparent difficulty. But it will, I think, be found that the difficulty arises mainly from the increased hardship of the case. The nature of the question is not changed, so far as a court of law is called upon to deal with it. I have already said that this was not a pawn or pledge of the stock. Neither was it strictly a mortgage. The conveyance was not made upon condition to become void on payment of the debt. It was absolute: and a re-transfer was necessary to change the title. The most usual mode of pledging or hypothecating this species of property is, to make an assignment with a power to transfer in case the debt is not paid; or to give a power to sell and transfer in the same event, without any formal assignment. In either case, the title is

not changed until the transfer is actually made. Although the mortgagee or pledgee has a qualified property, the legal interest remains in the original holder, who is entitled to all the privileges, and subject to all the responsibilities of a stockholder, except so far as those privileges and responsibilities may be affected by legislation. Here the transfer was actually made, and the defendants had all the muniments of a perfect title. Bush had ceased to be a stockholder, and the defendants had taken his place.

It is said that after the notes were paid, the equitable title to the property was in Bush. There is some difficulty in maintaining that position; for by the terms of the receipt the defendants had the option to return or account for the stock. But if the equitable interest was in Bush, the legal title still remained in the defendants. They might receive dividends, vote at elections, and enjoy all the other rights pertaining to the ownership of the property; and with the privileges, they must take the burdens of a stockholder. True, they would be answerable to Bush as trustees; but that can not affect their rights or duties in respect to third persons. This is a peculiar kind of property. The legislature has provided for the creation of the "stock," prescribed the mode in which it may be transferred, and conferred certain rights and liabilities upon the "stockholders." After the defendants had once become the legal owners, they could only throw off the liabilities incident to that relation, by transferring the stock. Until that was done they continued to be "stockholders," within the meaning of the statute. If we depart from the terms of the law, and inquire into the equities which may exist between the stockholder and some third person, it can not fail to embarrass creditors in seeking a remedy for the wrongs which may be done by the corporation. If creditors must look beyond the legal title, they can never know against whom to proceed. If the stock has been fraudulently transferred for the purpose of avoiding responsibility, and at the same time securing all the advantages of a stockholder, I do not intend to say that the real owner can not be reached.[1] Fraud vitiates everything. But where there is nothing but an honest trust, I think the rights of the creditor will be most effectually secured, and the policy of the law

[1] See *Marcy* v. *Clark*, 17 Mass. 330; *Moss* v. *Oakley*, 12 M. R. 1.

most fully carried out, by looking to the legal ownership of the property. There should be no exception to the rule, unless the existence of the trust appears upon the face of the usual evidences of ownership.

If, on receiving payment of the notes, the defendants had assigned the stock to Bush, it is possible that this action could not have been maintained. The assignment, as between the parties to it, would have passed the legal interest in the stock, although no transfer had been made upon the books of the company: *Bank of Utica* v. *Smalley*, 2 Cow. 770. But the defendants made no conveyance. They only gave a power to transfer; and until the transfer was actually made, they continued to be the legal "stockholders." They might have voted at elections and received dividends; and they must answer to the creditors of the corporation.

It seems to have been thought a matter of some moment that the plaintiff, so far as appeared on the trial, had not examined the stock ledger before he gave credit to the company. But there are other ways in which he may have learned that the defendants were stockholders. And besides I do not see that the liability of the stockholder has been made to depend on the fact that the creditor knew he could be reached. A man may so conduct as to render himself liable to third persons as the member of a partnership, although he had no legal interest in the business. But if he is in fact a partner, the matter in which he has conducted is a matter of no moment; nor is it important to inquire whether the creditor knew of the partnership at the time he parted with his property. So here, as the defendants were in fact stockholders, they must answer to the plaintiff, although he may not have known at the time he trusted the company that the defendants could be reached.

This is undoubtedly a hard case for the defendants. But many others are in the same unfortunate condition. Any law which transfers the debts of a broken corporation to the shoulders of the stockholder, will always punish some who are innocent for the transgression of others. Men must look to that before they become interested in such a company, either by contributing funds in the first instance, or by purchasing stock from the original corporators.

New trial granted.

[1] McCULLOUGH v. MOSS.

(5 Denio, 567. Court for the Correction of Errors, New York, 1846.)

[2] **The right of a corporation to make a promissory note** in the transaction of the business contemplated in its charter is recognized by the revised statutes. But it must affirmatively appear that it was made in the course of its legitimate business; the fact will not be presumed.

[3] **Ratification of acts ultra vires.** A corporation can not be bound by its agents for acts not within the powers conferred upon it by its charter. Contracts based on such acts are void and a subsequent ratification by the directors will not render them valid.

Proof of authority to make note. The authority of agents of a corporation must be shown. Proof that a promissory note purporting to be made by it was signed by the president and secretary is not sufficient without proof of their authority to sign it. (*Per* LOTT, Senator.)

[4] **A resolution passed by the stockholders** does not bind the corporation. It can only act in the manner provided by its charter. (*Per* LOTT, Senator.)

Personal liability of incoming stockholders. The act incorporating the Rossie Lead Mining Company, rendering the stockholders liable for its debts, is applicable to persons owning stock when the suit is brought, and not to those who were stockholders when the debt was contracted. (*Per* LOTT and VAN SCHOONHOVEN, Senators; BARLOW and TALCOTT, Senators, *contra*.)

On error from the Supreme Court.

This was an action of debt brought against the plaintiff in error as a stockholder in the Rossie Lead Mining Co., upon a promissory note dated October 9, 1839, for $4,050, made in the name of the company, and payable one year after date to the order of Moss & Knapp, and by them indorsed and negotiated to the defendant in error upon an existing indebtedness. The cause was first tried at the St. Lawrence Circuit in July, 1842, and upon a bill of exceptions a new trial ordered at the May term of the Supreme Court in 1843. (See 5 Hill, 131.) It was again tried at the same circuit in July, 1843, before the Hon. John Willard, circuit judge. The plaintiff below proved the signatures of the president

[1] See *Moss* v. *Rossie Co.*, 1 M. R. 289; *Moss* v. *Oakley*, 12 M. R. 1.
[2] *Moss* v. *Averell*, 10 N. Y 457; *Ward* v. *Johnson*, 95 Ill. 238.
[3] *Bissell* v. *Mich. Southern R. R.*, 22 N. Y. 302.
[4] See *Wood Hydraulic Co.* v. *King*, 3 M. R. 618.

and secretary of the company to the note, and that the president was also its general managing agent; a judgment by default thereon against the company in his favor, and the return of an execution unsatisfied. He then offered in evidence a letter written by the secretary of the company dated October 6, 1839, to one Lewis Moss, containing a copy of a resolution passed at a meeting of the stockholders of the company, that it was expedient for the company to contract with Moss & Knapp for the purchase of their smelting works, tools, machinery and certain other property, including the use of a patent and some apparatus for smelting lead, which Moss & Knapp owned. The reading of this was objected to, 1st: because it was the resolution of the stockholders, and not of the officers of the corporation; and 2d: that such a resolution could only be proved by the record of the company's proceedings. The objection was overruled, the evidence admitted and an exception taken. The plaintiff then offered in evidence the record of two judgments recovered against the company by default upon promissory notes signed by the president of the company, dated October 30, 1839. The evidence was objected to by defendant's counsel, 1st: as impertinent to the issue; 2d: that the defendant was not a party to those records; and 3d: that he was not a stockholder in the company when the judgments were recovered. The circuit judge overruled the objection and admitted the evidence, and the defendant's counsel excepted. The plaintiff then offered the note in evidence, and the defendant's counsel objected because no authority in the president and secretary to make promissory notes in the name of the company had been shown. This objection was also overruled, the note read in evidence, and an exception taken. The plaintiff here rested, and defendant's counsel moved for a nonsuit, because, 1st: the plaintiff had not proved an organization of the Rossie Lead Mining Company; 2d: he had not shown any authority to give the note; 3d: he had not proved any consideration for it, nor that it was given in the ordinary business of the company; and 4th: the officers of the company could not give a note on time which would hold the defendant as guarantor. The circuit judge overruled each of the objections and denied the motion, and the defendant's counsel excepted. It was then

shown that the note in suit was one of four notes, given to secure $15,000 and interest, to be paid by the company upon an agreement made by it with the payees, Moss & Knapp, on the 9th of October, 1839, which fact was known to the plaintiff when he became the holder of the note, and that he took it upon a precedent debt from Moss & Knapp. By the agreement Moss & Knapp sold the company a lease from George Parish, covering about fifty acres of land in Rossie, a portion of which was used for agricultural purposes, and upon which was erected a smelting works, eighteen or twenty small houses for workmen, a store, and a building originally built for a dwelling, but then used as a school house; their interest in a contract with Parish to wash and smelt lead ore; their interest in a contract with Fitzhugh & Vandewater for the transportation of freights to Oswego, Utica, Albany and New York; the use of a patent right for a smelting furnace, a three acre lot with a dwelling house upon it, and a quantity of personal property specified in an inventory annexed, among the items of which was a threshing machine. They also relinquished a claim which they made against the company upon a contract entered into with the original stockholders on the 12th of September, 1836, (being some time prior to their becoming incorporated) for smelting lead ore. This claim, amounting to about $10,000, the company had not recognized. It was further shown that the property sold the company under and by the agreement, was taken possession of by it and used until its failure, when a portion was sold on execution by the sheriff, and the remainder went into the hands of a receiver, appointed by the court of chancery, and that the price of $15,000, paid for it, was made up without including in the amount anything for the claim for damages, the patent right, or the threshing machine. These were thrown into the bargain because the company insisted upon it. The circuit judge charged the jury that the plaintiff was entitled to recover the amount of damages recovered against the corporation, excluding the costs of that suit. The counsel for the defendant requested him to charge that the plaintiff was *not* entitled to recover, for the same reasons which were stated on the motion for nonsuit, and also because, 1st: the consideration of the note was illegal, and not within the corporate powers of the company; 2d: the defend-

ant was a guarantor for the debt of the company and entitled to hold its agents strictly within the bounds of their authority, and the evidence showed an unwarranted exercise of authority in the purchase from Moss & Knapp, of which fact the plaintiff had notice; and 3d: a part of the consideration of the note arose before the defendant became a stockholder of the company. This request the circuit judge refused to grant, and charged the jury that as a matter of law the reverse of each of the propositions was true; and defendant's counsel excepted. The jury found for the plaintiff, $4,780.90. Upon the argument of the motion for a new trial on the bill of exceptions, the opinion of the court was as follows.

NELSON, Ch. J.

In the first place the evidence in the case shows that the claim for damages upon the smelting contract constituted no part of the consideration money for which in part the note in question was given. The $15,000 was given for the interest of Moss & Knapp in the smelting works and appurtenances. This was the estimate of the value at the time, and as appears, no more than the property was worth in cash. This evidence in no way contradicted the written contract of purchase, but was entirely consistent with every part of it. There were mutual claims for damages between the parties at the time, growing out of the smelting contract. On the one side, for non-compliance on account of the impurities of the ore delivered, and on the other for not going on and smelting the article as stipulated. These claims were mutually given up and canceled, without being taken into the account in putting a valuation on the property. The fact of the existence of these contested claims for damages and other difficulties growing out of the contract may, and probably did, form an inducement to the sale and purchase of the apparatus on both sides. But that of itself can not be regarded as part consideration of the purchase within the sense of the term as contended for here. It constituted no part of the purchase money of the property sold and delivered to the company. Indeed, in looking at the ground of the claim put forth by Moss & Knapp in connection with the contract, it is quite difficult to see any foun-

dation in law for it. But in the next place, if it did, I am inclined to think that these inchoate disputed claims arising out of alleged breaches of the smelting agreement, in the course of its execution did not constitute any debt or demand against the company within the meaning of the charter in this particular until adjusted between the parties either by amicable arrangement by the competent parties, or by suit. It was a claim sounding in damages for breaches of the contract, occurring and running through a period of some year and a half, and would not and did not assume the form or nature of a debt, in the strict legal acceptation of the term, until adjusted by the arrangement in October, 1839. It was then also a claim entire and incapable in law of being severed and apportioned according to the several periods when the breaches may have occurred, if at all. It became a debt or demand against the company in the sense of the statute, when the adjustment took place and not before.

All the other questions in the case will be found considered and disposed of, when this one and the suit against the company were formerly before the court (5 Hill, 131, 137). New trial denied.

J. VAN BUREN, for the plaintiff in error, urged the several points contained in the exceptions taken upon the trial, and insisted that the assumption by the company of the agreement between Moss & Knapp with Fitzhugh & Vandewater, and the purchase of the patent right to use the smelting apparatus, were each without the corporate powers of the company, and the purchase of the three acre lot was prohibited by the statute in relation to corporations (1 R. S. 599, § 1, Subd. 4), as the company was then possessed of real estate to the full amount of its capital; and that these questions should have been submitted to the jury.

J. A. SPENCER and F. KERNAN, for the defendant in error.

LOTT, Senator.

After a careful examination of the act to incorporate the Rossie Lead Mining Company, (Laws of 1837, p. 441,) I

have arrived at the conclusion that stockholders who were such at the time the debts due from the corporation were contracted, and they only, are liable for their payment. It was declared by the second section of the act that the owners of the interests under the lease and the supplemental agreement therein mentioned should be the owners of the capital stock in the proportion of their interests. They had, as appears by the contract of September 12, 1836, with Moss & Knapp, previously formed themselves into a stock company, and contracted for the smelting and sale of the lead ore they should obtain from the mines leased to them. In this state of their affairs (which it appears to me very important to bear in mind in giving a construction to this act), they became incorporated by the same name which the joint stock company bore, and for the specific term to which their rights of mining were limited by the lease. The act of incorporation does not, however, confer all the rights usually incident to a corporation. A very important privilege, exemption of the stockholders from personal liability for its debts, is denied them, and they are made severally as well as jointly liable therefor.

If the ninth section had only declared this personal liability of the stockholders, and no provision had been made by it and the tenth section for suing them, I apprehend there could be no reasonable doubt that it applied to those only who were such at the time the debt was contracted. That is referred to and spoken of in connection with this liability. It is, moreover, the natural construction. The right of the creditor accrues on the creation of the debt. As a general rule he can only look for its payment to the individual contracting it. If credit is given, it is on his means and responsibility, and it appears to me that the intention of the legislature in securing the personal liability of the stockholder, was only to give the creditor the same security he would have if the company had not become incorporated. The latter part of the ninth and the tenth sections of the act impose no new obligation and create no new liability on the part of the stockholders, nor give any new right or security to the creditor. They only operate on his remedy to enforce and make available the right previously secured. It is declared that the creditor may sue any stockholder. There may be justice in giving him the election

to sue either, one who was a stockholder when the debt was contracted or one who may have become so by a subsequent purchase at a reduced price in consequence of the outstanding debts at the time; but I can not discover any principle, either in the nature of the business or the objects of the incorporation, to justify a provision depriving him of a remedy against one owning stock at the time he gave the company credit, and limiting his right to seek satisfaction from a person who subsequently became a stockholder and to whose responsibility he never trusted. Such a provision would be unreasonable, and a construction which would lead to such a result should not be given to the act unless absolutely necessary to give it effect; and in my opinion it is not required, and would be inconsistent with its whole scope and design. The stockholders are declared to be liable for the payment of all debts. As soon, therefore, as a contract is made, the liability attaches, and of necessity to the stockholders at the time, and this can not be divested except by satisfaction of the demand. It is not strictly a case of guaranty or suretyship, where *laches* or indulgence by the creditor would operate as a discharge. It is a burden imposed on each stockholder as one of the conditions of the charter, that he shall be a principal debtor for all debts or demands contracted by the corporation while he is a member of it.

The object of the legislature was doubtless, security to those dealing with the company, and the construction given by the Supreme Court is the only one which can fully and effectually carry out that intention. If their remedy were confined to those owning stock when suit was brought, or when judgment was recovered, or execution issued or returned, great facilities would be afforded for those who had derived the benefit of the labor or property for which the debt was incurred in the increased value of the stock, or by the receipt of dividends, to avoid personal responsibility by transferring their stock in anticipation of a suit to enforce payment. A creditor would by that means be deprived of the security upon which it is reasonable to presume he relied when the credit was given, and be compelled to seek redress from parties who were unknown at the time and whom he might have been unwilling to trust. It is no answer to this view of the case to say

that if a fraudulent transfer was made the liability would not be discharged, and that recourse might be had to the prior holder of the stock. Proof to establish such a fact is always difficult, and it is not just or reasonable to impose the necessity of furnishing it on a creditor. I am aware that this construction is not in accordance with the decisions of the courts of Massachusetts and Connecticut on statutes of an analogous character, referred to in *Moss* v. *Oakley*, 2 Hill, 265. Without examining the reasons assigned for those decisions, it is sufficient to say that they have no controlling authority. The principal case in Connecticut did not meet the unanimous approval of the court; and as was shown by Justice Bronson in *Moss* v. *Oakley*, the others are distinguishable from the present case. Assuming, then, the rule above adopted to be correct, it remains to be considered whether the defendant is liable under it for the debt in question. The suit is brought on a negotiable promissory note, purporting to have been made by the Rossie Lead Mining Company, payable one year after date to the order of Moss & Knapp, and by them indorsed to the plaintiff. If the company were authorized in the exercise of its legitimate business to make it, the question is presented by the case whether its execution was proved. It is signed by J. Averill as president, and D. C. Judson as secretary; and it is shown that they were such officers at that time, [and that Averill was also "general managing agent." There is, however, nothing in the nature of those offices as connected with the object and business of the company from which a general power to make notes could be implied. The affairs of the corporation were to be conducted by five directors, a majority of whom formed a board for the transaction of business, and a decision of a majority of those duly assembled as a board was requisite to make a valid corporate act. (1 R. S. 600, § 6.) The authority of the board to the president and secretary was therefore necessary to give validity to the note. This was not shown. The resolution passed at the meeting of the stockholders, contained in the letter of the secretary, dated October 6, 1839, could not bind the corporation, especially so as to affect the members not present. When a charter invests a board with the power to manage the concerns of a corporation, the power is exclusive in its character.

The corporators have no right to interfere with it, and courts will not, even on a petition of a majority, compel the board to do an act contrary to its judgment: Angell & Ames on Corp., 121 to 123, 151 to 164.

The stockholders as such, in their collective capacity, could do no corporate act. The directors were their representatives and alone authorized to act. It is one of the fundamental conditions of the contract into which the corporators have entered by becoming members of the corporation, that its concerns shall be managed in the manner prescribed by the act of incorporation, and from this no essential departure can be made. But if such a resolution properly passed were obligatory, and could have authorized the officers of the company to make the note, yet the objection to the proof was well taken. No original minutes of the meeting were produced nor, indeed, was there any evidence that such a meeting had ever been held. The mere production of Judson's letter stating it, did not prove the fact. Nor were the two records of judgment against the company admissible as "persuasive evidence" of the authority of the president to make the note. They did not tend to that object. Both of the notes on which they were recovered were dated Oct. 30, 1839, twenty-one days after the note in suit. If they had been concurrently given, and for the same consideration, as is stated to have been the case in Moss against the company, 5 Hill, 139, they might possibly have afforded some color of authority, or, at least, fortified the other evidence of ratification, provided the suits had been actually and in good faith defended, although the position is very questionable. But a judgment "*by default*," in a suit which must be commenced by the service of the first process on the presiding officer, cashier, secretary or treasurer, if there be such officers, (2 R. S. 458, § 5,) and which, in the absence of proof of service upon the treasurer, I think it is fair to presume, was commenced by such service, either on Averill, the president, or Judson, the secretary, can not, without it is shown to have come to the knowledge of the board of directors, have that effect; especially as against a defendant who was not a stockholder when it was obtained. It would, in effect, be establishing the principle, that one unauthorized act by the officers of a corporation would justify and legalize

another. There was, therefore, no legal evidence of the execution of the note by the company, and the circuit judge erred in permitting it to be read. The proof afterward introduced to show a subsequent ratification of the act, was insufficient to charge the defendant. To have rendered it available as against him, it should have been shown that the act was adopted while he was a stockholder. He sold his stock on the 10th of December, 1839, and the note was made the 9th of October previous. The principal circumstances relied on to show a ratification during the intermediate time, are the use of the personal property, and the occupation of the real estate for which the note was given. That, however, was no evidence of a change of ownership. It was perfectly consistent with their prior relation to Moss & Knapp. The workmen who had been previously in their employment continued to work and occupy the premises as they had previously done. There was, therefore, no external change in the management of the affairs of the company. It is true one of the witnesses saw four of the directors at the works after the sale, and some of them there about the time it was going on. This can not amount to a ratification. It is not inconsistent with the continuance of the smelting contract of September 12, 1846. But if it were not, the presence or, indeed, the active interference of individual directors would be inoperative and ineffectual. The concurrence of a majority of the board when duly assembled, is requisite to constitute a valid act; the assent of the several members separately is not enough: *Livingston* v. *Lynch*, 4 John. Ch. 596, 597. The ratification of an unauthorized transaction can never be inferred from the acts of the very officers or agents by whom it was made. The assent or recognition of the principal must be shown. In any view of the case, therefore, I am of opinion that there was no proof either of the original execution of the note or its subsequent ratification. As, however, this defect may be supplied on a new trial, I will proceed to examine into its validity on the assumption that it was made by the authority of the board of directors.

The right of a corporation to make a promissory note for a debt incurred in the course of its legitimate business, although it is not expressly authorized to contract in that form, appears

to be conceded in our courts: *Mott* v. *Hicks*, 1 Cowen, 513; *Att'y Gen.* v. *Life and Fire Ins. Co.*, 9 Paige, 470. The power is indeed recognized by the revised statutes to exist in every corporation capable by law of making contracts (1 R. S. 768, § 3). But in the view I have taken of the case, it is unnecessary to examine whether the Rossie Lead Mining Company had this power. I am satisfied that the note in question was given for purposes and objects unauthorized by its charter and therefore not obligatory. It was incorporated "for the purpose of raising and smelting lead ore or galena, at Rossie, in St. Lawrence county," with a capital of $24,000, divided between the members of the company of the same name, already formed and in operation. It is declared by statute (1 R. S. 600, § 3), that no corporation shall possess or exercise any corporate powers not expressly given in its charter or enumerated in the general powers given to all, except such as shall be necessary to the exercise of those so enumerated. The note in question was given for part of the consideration agreed to be paid Moss & Knapp for their transfer to the company of real estate and property to be used as an addition to its capital. Every corporation has the general power "to hold, purchase and convey such real and personal estate as its purposes shall require, not exceeding the amount limited in its charter." 1 R. S. 600, § 1, Sub. 4. That, however, does not confer an unlimited discretion as to the amount of property so to be held or purchased, even when there is no limitation as to it in the charter, especially when the business of the corporation requires a capital that is fixed and limited. It is always contemplated that the transactions of the company shall be limited to its capital. Each stockholder must be presumed to be influenced by the fact, and particularly so when he can be made liable, individually, for the company's debts. It is evident that the legislature in granting special privileges to a corporation, do not contemplate that the capital shall be increased to an amount beyond that specified in the charter. That is made the basis of security for the satisfaction of the debts of the company, and no part of it can be withdrawn without the consent of the legislature: 1 R. S. 601, § 2. There is an additional consideration which appears to me conclusive on the question. The whole policy of our law requires

that the entire capital shall be paid in in cash, so as to furnish a substantial security for the discharge of responsibilities incurred in its dealings. The company can not receive any evidence of debt in lieu of cash, in payment of any portion of its capital, nor permit any part of the capital to be withdrawn: Id. The whole policy of these provisions would be evaded, if the transaction under consideration were sanctioned. It appears by the act of incorporation itself, that the corporators were at the time of its passage the owners of certain rights, under a lease to discover and work lead mines at Rossie, for a specific period. The duration of the charter was limited to the same time. It is evident, therefore, that its operations were intended to be limited and restricted to the land in the lease referred to. No additional capital was authorized or contemplated. By the mode adopted, however, it obtains a property as an addition to its capital to the amount of $15,000, not by the payment of cash, but by incurring a debt for the whole sum, payable in four annual installments, with interest. And they were at perfect liberty to part with the whole of this the next day, without having paid a cent therefor, and divide the proceeds among the stockholders, and permit the vendor, as a creditor, for nearly two thirds of the entire actual capital, to come in and deprive to that extent, or at least in that proportion, the workmen and other *bona fide* creditors of their right to payment out of the capital, a result never anticipated by the legislature.

So, on the other hand, the liability of the individual stockholders might be increased far beyond the amount ever contemplated by them, without their receiving any benefit therefrom. If, however, I am mistaken in this view of the question, and the corporation had authority to make a purchase, on credit, of property deemed necessary for its legitimate purposes, yet I am clearly of the opinion that its powers were exceeded in the purchase of the farm, the three acre lot, the school house, store and threshing machine. It had no authority to engage in agricultural or mercantile pursuits, or the education of youth. They were all very laudable pursuits, and probably as profitable as raising and smelting ore; but they were foreign to the purposes for which the corporation was created, and obviously, not necessary to carry them into

effect. This is, indeed, conceded by the learned judge who delivered the opinion in Moss against the company (5 Hill, 137,) which was adopted by the court below in this case. He, however, to justify this purchase of property, which to use his language "in the abstract did not come within the corporate powers of the defendants," says, "It seems the vendors were not willing to except anything, and the defendants took the whole; and we must, if necessary, intend this was so on the presumption that they would not wilfully transgress their powers. It might therefore be inferred that they purchased the extra land, if any, the school house, threshing machine, etc., as a *sine qua non* to a bargain, which, on the whole, was valuable and pertinent to their business." "This," he adds, "they had a right to do." To this doctrine I can not yield my assent. No inference can be made in favor of a body of limited powers, and it can afford no justification for an unauthorized or illegal act, that a lawful object could not be otherwise attained. Individual stockholders on becoming subscribers to the stock of a corporation, are apprised by its charter of the powers conferred upon its agents. These can not be transcended by any considerations of expediency which they suppose may result to the stockholders from an act not within the scope of their authority. The relative rights of a corporation and its stockholders were considered in the case of *Hartford and New Haven Railroad Company* v. *Croswell*, 5 Hill, 383. It was there held that "no radical change or alteration can be made or allowed, by which new and additional objects are to be accomplished or responsibilities incurred by the company so as to bind the individuals composing it without their assent." p. 386. The same rule was applied by Chancellor Kent to a private association, in *Livingston* v. *Lynch*, 4 John. Ch. Rep. 573, above cited. The principle is a sound one and appears to me conclusive on the main question in this case. It appears that the proprietor of the mining lands at Rossie gave leases of separate portions thereof to different individuals on which separate associations located. The Rossie Lead Mining Company held one; the Rossie Galena Company incorporated at the same time (Laws 1837, p. 445), held another; and Moss & Knapp a third one; which latter was assigned to the Rossie Lead Min-

ing Company as part of the consideration of the note in question. If, instead of this lease, the rights of the Galena Company had been purchased, I presume it would not have been contended that it was within the corporate powers. But there is no difference in principle between the cases. There are other provisions of the contract which appear exceptionable. The power of smelting lead was, as it appears to me, clearly intended to be of such only as the company raised. It could not, therefore, assume the contract with Parish. The undertaking to carry out the stipulations of Moss & Knapp's contract with Fitzhugh & Vandewater also seems to me to have been unauthorized.

There is another objection taken on the trial which I will briefly notice. It relates to the proof given to show that the account rendered for damages under the smelting contract did not form a part of the consideration of $15,000, for which in part the note in question was given. The relinquishment of mutual claims by one party against the other appears in the agreement itself to have entered into the consideration therefor. And although it may not, as Chief Justice Nelson says, have formed "a part of the purchase money of the *property sold and delivered* to the company," yet it does not follow that it did not constitute a part of the sum agreed to be paid by the company. It is true one of the partners of Moss & Knapp swears that the claim was thrown in, although he considered it justly due, but that does not prove that the company would have paid the amount agreed on if that account had not been settled. Indeed it appears in the letter of Judson that but for certain circumstances said to have been mentioned by Moss to him, he would not have consented to give more than $12,500; but what the circumstances are is not stated. The claim amounted to more than $10,000. It does not appear, however, what the counterclaims of the company were, and I have discovered no evidence to warrant the remark of the learned judge, so far at least as relates to the company, "that these claims were mutually given up and canceled without being taken into the account in putting a valuation on the property." But whatever may have been the fact, it was not competent by parol testimony to show that the account formed no part of the consideration for the note in question. A

written instrument can not be contradicted nor explained in this manner. If, however, it be conceded, as the learned chief justice says, that "the evidence in no way contradicted the written instrument, but was entirely consistent with every part of it," yet the circuit judge could not decide, as a matter of law, that the account did not enter into the consideration. That was a question for the determination of the jury. The contract out of which it arose was entered into before the defendant became a stockholder, and he could not be held responsible for any right accruing under it. The plaintiff, as indorsee of the note, stands in the same situation as the payees. He took it of them as a security for an antecedent debt, and of course subject to all equities between the original parties. He was, moreover, bound to know that the company was limited in its powers, and he can not, therefore, in any way be considered a *bona fide* purchaser without notice. The sale of a part of the property assigned by the agreement to the company, by an execution, and of the balance by a receiver, occurred after the defendant ceased to be a stockholder and could not affect his rights. It could not, under any circumstances, have made the original transaction valid. The rule on this subject was properly laid down by Justice Jewett in *Hodges* v. *The City of Buffalo*, 2 Denio, 110, in which he says, "It can not be maintained that a corporation can, by a subsequent ratification, make good an act of its agent which it could not have directly empowered him to do."

If these views are correct, the judgment of the Supreme Court is erroneous and must be reversed and a *venire de novo* awarded.

PUTNAM, Senator, delivered a written opinion maintaining the same views, except in relation to the time when a stockholder of a corporation was bound individually for its debts. Upon this point his opinion was as follows:

By the 9th section of the charter "the stockholders of the said corporation shall be jointly and severally personally liable for the payment of all debts or demands contracted by the said corporation, or their authorized agent or agents, and any person having any demand against the said corporation, may sue any stockholder, director or directors, in any court having cogni-

zance thereof, and recover the same with costs." The personal liability, if any, arises solely under this section. So far as I have been able to discover, this question is now for the first time raised in this court. It is not, however, a new question. In Connecticut, the judges, under a similar statute, have entertained opposite or different opinions as to the time the liability attaches. Our Supreme Court in the case of *Moss* v. *Oakley*, 2 Hill, 265, under this same charter, decided that only those who were stockholders when the debt was contracted, were liable. If the principle laid down by the court in that case is a fair and correct construction of the statute, then the decision should be conclusive upon this court; otherwise not. The first branch of the section makes the stockholders liable for the debts contracted. The other branch gives the remedy by suit against any stockholder, director or directors, in favor of any person having a demand. In determining the liability with reference to the time when it accrued, Justice Bronson was not free from difficulty, for he says: "I do not, however, intend to lay much stress upon the particular wording of the section, for it must be admitted that the statute may be so construed, without doing any violence to the language, as to make it apply to those who were stockholders at the time the suit is commenced." He disregarded the language of the section, which he admits may not refer to the stockholders *when the suit is commenced;* and taking his view of the question, from the nature of the case and the general scope of the act, he comes to the conclusion that the liability refers to the stockholders who were such when the debt was made. When the intention of the legislature is plainly manifested in the language of a statute, and the object intended in the passage of the act is attained, I know of no warrant or authority to look at the general scope of the act to determine its construction. What did the legislature intend by the section in question? The answer is plain; the intention is obvious. A personal liability of the stockholder, which is as absolutely obtained by the construction which the justice says may be given to the section, as in that settled upon by him and arrived at by looking at the whole statute. Now each section of a statute must be construed by itself, and not borrow aid from other portions of the act, provided it is susceptible of such a con-

struction as will be consistent with the general provisions of the act. If we apply these rules to the section before us, we have no difficulty. It creates a personal liability, but *when* that attaches to the stockholder the section does not determine. The Supreme Court infers or construes the statute to mean the time when the debt was created. Such an inference, I think, is not borne out by the language of the section. I repeat that the first branch of the section merely establishes the personal liability. The next branch declares that "any person having any demand against the said corporation may sue." And who may be sued? "Any stockholder," is the answer given in the statute language; clearly referring to the time of the commencement of the suit, and thereby designating who is to be sued. He must be a stockholder when the suit is commenced. Now the liability and the person to be sued are clearly fixed. If the legislature intended that an old stockholder, or one who was so when the debt was created, might be sued, they would have said so, as they have in other charters.

When there is difficulty in arriving at the construction of a statute, it is proper to take into view the general system of legislation upon like subjects in order to aid in its construction: 3 Mass. 17, 21; 1 Pick. 248. The act in relation to the Oriskany Manufacturing Company (Laws of 1844, p. 34), after fixing the personal liability clause, adds, "to be recovered of the stockholders who are such when the debt is contracted, or of any subsequent stockholder." The charter of the Buffalo Gas Light Company (Laws of 1845, p. 277), has precisely the same language. And where a different period or principle determines the liability, we find the legislature is particular in the language used, admitting of no doubt as to its construction. In the act relative to "manufacturing incorporations," passed in 1811, the personal liability clause is incorporated in the following language: "And that for all debts which shall be due and owing by the company *at the time of its dissolution*, the persons *then* composing such company shall be individually responsible to the extent of their respective shares of stock." The time when the debt was contracted was not the time fixed, nor was the time when the suit should be commenced, but the time of dissolution. Precisely the same

language is used in the act to incorporate the Ballston Spa Manufacturing Company: Laws of 1836, ch. 193. The persons composing the company at the time of its dissolution are made liable. I venture to say that every charter containing the personal liability clause, fixes by its terms the principle, and in language not to be mistaken. In two of the instances cited those who are stockholders when the debt is created, are made liable, and in two other cases those at the dissolution of the corporation. In the case before us, I deem the language equally as decisive, referring as it does to the time when the suit is commenced. Looking, then, to the history of legislation upon the subject, going back to 1811, and coming down to the present time, we see that the language has been precise and definite, evincing much caution as to the terms used, and leaving nothing in uncertainty to be determined or guessed out by our courts of justice. It seems to me that in the case before us the words of the statute are too plain to be misunderstood. They speak for themselves, and make the stockholders liable who hold stock when the suit is commenced. Without any qualifying language, the words "may sue any stockholder," must necessarily refer to the time when the suit is brought. A stockholder is to be sued; not one who *was* a stockholder. If correct in my view of the section, the plaintiff below had no cause of action against the defendant, as he had parted with his stock before the suit was commenced.

VAN SCHOONHOVEN, Senator, delivered an oral opinion in favor of reversal, expressing views similar to those contained in the opinion of Senator Lott.

BARLOW and TALCOTT, Senators, delivered written opinions in favor of affirming the judgment, for reasons substantially the same upon which the cause was decided by the Supreme Court, and holding that those who were stockholders when the debt of the corporation was contracted were contemplated in the personal liability clause in the act of incorporation.

GARDINER, President, delivered a written opinion in favor of affirmance.

On the question being put, "*shall this judgment be reversed?*" the members of the court voted as follows:

For reversal: the President, and Senators BACKUS, DEYO, EMMONS, HARD, LOTT, PORTER, PUTNAM, SANFORD, J. B. SMITH, VAN SCHOONHOVEN—11.

For affirmance: Senators BARLOW, BURNHAM, JONES, SCOVIL, SEDGWICK, S. SMITH, TALCOTT, WHEELER—8.

Judgment reversed.

BRAYTON v. NEW ENGLAND COAL MINING CO.

(11 Gray, 493. Supreme Court of Massachusetts, 1858.)

Personal liability—Pursuing stockholders when officers have property. A stockholder in a mining company can not defend himself from judgment in an action against himself, impleaded with his corporation, under Stat. 1851, C. 315, by showing that the officers of the corporation have sufficient property to pay the judgment.

Action of contract against a manufacturing corporation who were defaulted. Spencer Field, summoned in as a stockholder, answered that he was not liable for their debts as a stockholder, "because if the stockholders thereof are liable for the debts of the corporation, their persons or property can not be taken so long as the officers thereof have property sufficient to satisfy the execution, if any, which the plaintiff may obtain, and there are officers of said corporation having sufficient property to pay said claim." The plaintiff demurred to this answer, upon the ground that the fact pleaded was immaterial. The court of common pleas sustained the demurrer, and the respondent appealed.

E. WILLIAMS, for the plaintiff.

E. H. BENNETT, for the respondent.

The property of a stockholder in a manufacturing corporation can not be taken on execution against the corporation, so long as the officers thereof have sufficient property to satisfy the execution: *Denny* v. *Richardson*, 4 Gray, 274. The stockholder should be allowed to show the fact of such sufficiency

in the original suit, so that a supersedeas as against him may be annexed to the execution against the corporation (as was done in 4 Gray, 275) and not be put to an action of trespass against the sheriff.

BIGELOW, J.

The answer of Field states no sufficient ground for issuing a supersedeas of the execution which is to issue against the corporation as to him or his property. The only ground on which he can claim exemption in this action from liability to a seizure or levy on the execution is by showing that he was not a stockholder of the corporation, liable for their debts. The fact that there are officers possessed of property sufficient to pay the judgment against the corporation at the time when the liability of the stockholders is to be determined, is wholly immaterial. The plaintiff is entitled to an execution against those who are stockholders liable for the debts, and who have been duly summoned in the action. This execution he can levy on the stockholders, if no property of an officer can be found to satisfy it. An officer of a corporation may have property liable to be taken on execution at the time when the liability of the stockholder to the execution is to be determined in the action against the corporation, but it may be conveyed away or destroyed before the execution is issued, so that the creditor can not levy on or seize it. In such case he has a right to take the property of the stockholder. So that the material question is, not whether the officers were possessed of sufficient property to pay the debt when the action is pending in court, but when the execution is to be served.

Demurrer sustained.

SMITH v. MAINE BOYS TUNNEL CO.

(18 California, 111. Supreme Court, 1861.)

Forfeiture of stock—Ejectment no remedy. Plaintiff and others, owners of undivided interests in a possessory mining claim, became incorporate, and from that time worked the claim as corporate property. Assessments were levied upon the stock, and plaintiff's share was advertised and sold to pay his assessment; he then sued the company for an undivided interest in the claim. *Held*, that he mistook his remedy; if the stock was improperly sold, he could maintain an action for its recovery, but could not recover a specific interest in the corporate property.

Appeal from the Fifth District.

Plaintiff sues to recover an interest in a mining claim, alleging ownership since 1855, and an expenditure of $1,200 in working and carrying on the same; that defendants are in the exclusive possession, etc., and prays that the right to said interest be determined and he have restitution.

The answer denies that plaintiff was the owner of the interest set forth at the time of the commencement of the suit, or that he was or is entitled to the possession; denies that at the commencement of the suit defendants were in possession of the claim or interest, or have refused to allow plaintiff to take possession, etc.

It seems that the plaintiff and others, who were owners in the claim in the fall of 1858, formed themselves into a corporation under the act of 1853. The claim was divided into twenty-one shares, which were represented in the articles of incorporation at one hundred dollars each. In the spring and summer of 1859 the corporation levied assessments upon different shares to defray the expenses of working the claim. Plaintiff's assessment being unpaid, the share was sold at auction, after advertisement in a paper, and H. B. Wade, a member of the company, became the purchaser. After that time the company refused to recognize plaintiff as having any interest in the corporation. Other facts appear in the

opinion of the court. Defendants had judgment. Plaintiff appeals.

L. QUINT, for appellant.

H. P. BARBER, for respondent.

COPE, J., delivered the opinion of the court, FIELD, C. J., concurring.

The plaintiff has mistaken his remedy. If his stock has been improperly sold, he may maintain an action for its recovery, but he can not sue the corporation for a specific interest in the corporate property. It appears that he was one of the original corporators, and that the property in question has been held as corporate property from the time the corporation was formed. Under these circumstances he should not, we think, be permitted to question the title of the corporation, particularly as the property is a mining claim, and could only be held by occupation and possession.

This view is decisive of the case, and the judgment is affirmed.

THE MERRIMAC MINING CO. v. BAGLEY.

(14 Michigan, 501. Supreme Court, 1866.)

[1] **Liability of stockholder for assessments.** A stockholder, who was not one of the original subscribers to a mining corporation organized under the general mining law, is liable, the same as an original subscriber, for any balance due upon assessments, after applying the proceeds of stock sold for default.

Error to Wayne Circuit.

This was an action of assumpsit, brought by plaintiffs to recover of defendant, who was a stockholder by purchase, the balance of certain assessments claimed by said plaintiffs after the sale, on default, of defendant's stock.

[1] *Kirksey* v. *Florida Co.*, 7 Fla. 23; 68 Am. Dec. 426; see *South Mountain M. Co., in re*, 7 Saw. 30.

The cause was tried without a jury, on the following stipulation:

"In Circuit Court for the County of Wayne, State of Michigan. The Merrimac Mining Company of Lake Superior, plaintiffs, v. George F. Bagley, defendant.

It is hereby stipulated by the parties, plaintiff and defendant in the above entitled cause, that on the trial thereof, the following facts shall be admitted without proof:

That the plaintiffs are a corporation duly organized and established under the manufacturing and mining laws of the State of Michigan, with a capital of $500,000, divided into shares of $25 each.

That the statutes of this State, and the by-laws of said company, so far as is necessary to authorize said company to make and collect assessments upon stock, have been complied with.

That at a meeting of the directors of said company, on the 27th day of March, 1865, an assessment of one dollar on each share of stock was duly and legally laid, and due notice thereof was given to the defendant in accordance with the laws of this State and the by-laws of said company, and that said defendant was not one of said directors.

That before and at the time of laying said assessment, and up to the time of sale hereinafter mentioned, said defendant was the owner of three hundred shares of said stock, which had been sold, assigned and transferred to him by stockholders of said company, after the payment on each of said shares of five dollars and fifty cents; and held two certificates of said stock in the form set forth in the first count of the plaintiffs' declaration, which had been issued and delivered to him by said corporation after said assignment, one of said certificates being for two hundred shares, and one for one hundred shares of said stock; and that he thereafter, and up to the time of said sale, continued to hold the same.

That after due and legal notice of the laying of said assessment, the defendant refused to pay the amount assessed upon his stock, and that thereupon the said stock of said defendant was duly forfeited and sold in the manner set forth in the plaintiffs' declaration, and that said sale was in all respects legal and valid.

That the amount realized from said sale was one hundred

and fifty dollars, and that the defendant has never paid the remainder, nor any part of said assessment.

That if said plaintiffs are entitled to recover against said defendant, judgment shall be entered against him for the balance remaining unpaid of said assessment, after deducting said one hundred and fifty dollars.

April 7, 1866." (*Signatures of Att'ys.*)

It was also further stipulated that a copy of the by-laws and articles of association of said corporation should be used on the trial, in all respects as if they had been duly and properly proven.

The court found for the defendant.

D. B. & H. M. DUFFIELD, for plaintiffs.

MAYNARD, MEDDAUGH & SWIFT, for defendant.

CAMPBELL, J.

The only question presented for decision in this case is, whether a stockholder who was not one of the original subscribers to a mining corporation, organized under the general mining law, is liable for the balance due upon assessments, after applying the proceeds of stock sold for default.

It was held by this court in *Carson* v. *The Arctic Mining Co.*, 5 Mich. 288, that an original subscriber was liable for such deficiency, after his stock had failed to bring enough to clear off the assessment for which it was sold. There was nothing in his subscription beyond the single act of taking so much stock in the company when it was formed.

Subscribing, then, meant nothing more than becoming an original stockholder; and the duty to pay, which was held by the court to rest upon him, sprang solely from that relationship.

There is no principle of law which can establish any difference among stockholders in the duties which are implied from that relation. The very essence of a corporation consists in its corporate succession, which, in stock companies, is kept up by the substitution of one owner for another in the proprietorship of shares. If the original stockholders stand under differ-

ent relations to the company from their assigns, the corporation itself loses some of its attributes by the substitution, or else becomes introduced into more complicated relations. It seems to be an unavoidable conclusion, that every liability which attaches to a stockholder, as such, is inseparable from the ownership of the stock.

There is nothing in any of our statutes from which any different rule can be deduced. The stockholders whose rights are recognized in fixing upon the sale of stock for assessments are always the owners of the shares involved. In the section of the general mining law, providing for such sales, there is no reference whatever made to original subscribers who have sold their stock, although if they were liable to respond they would be especially interested in a matter where a want of notice might involve them in serious loss. See Comp. L. § 1809.

The case of *Carson* v. *The Arctic Mining Co.*, having been decided with reference to the law under which the plaintiff was incorporated, and having established the responsibility of original stockholders, must, upon the grounds stated, govern this controversy also, as the questions, as we view them, are identical in both suits.

The judgment upon the agreed state of facts must be reversed, and a new judgment entered in this court for one hundred and fifty dollars damages, with costs of both courts.

The other Justices concurred.

DAVID N. HAWLEY v. JOHN W. BRUMAGIM, Adm'r of the estate of George Peck, deceased.

(33 California, 394. Supreme Court, 1867.)

[1] **Where the language of a contract is not ambiguous,** but of plain and obvious import, the rule is imperative to follow the language employed in its interpretation.

Warranting value of stock at a future date. Where the vendor warranted that the stock sold should be worth a certain sum upon a certain future date he is not discharged by the fact that after the sale, but before the date fixed, the stock had reached the agreed figure.

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[1] *Walker* v. *Tucker*, 8 M. R. 673.

[1] **Identity of stock not changed by re-issue.** The surrender of stocks by the assignee thereof for cancellation, and the taking of other certificates in his own name, does not change the identity of the stock.

Appeal from the District Court, Fifteenth Judicial District, City and County of San Francisco.

This was an action against the defendant, as administrator of George Peck, deceased, who in his lifetime sold to the plaintiff "twenty-five shares of Summer stock, upon Peck's warranty that the stock shall be worth and marketable in San Francisco at two hundred dollars per share on November 27th, 1864." The contract was in writing, and was in the terms following, to wit:

"David N. Hawley has this day purchased of me twenty-five shares of the Summer Gold and Silver Mining Company, located in Cove District, Tulare County, State of California, for the sum of twenty-five hundred dollars, upon my agreement to warrant to him that said stock shall be worth and be marketable at two hundred dollars per share in the city of San Francisco, on the 27th day of November, 1864.

Said Hawley agrees to keep said stock until that time, and if the same shall not be worth in the market of San Francisco the said sum of two hundred dollars per share, then I agree in consideration of said premises and of his retaining said stock, to make good the deficiency, and to pay him in gold coin such sum as shall be necessary to make it equal to the said price of two hundred dollars per share.

GEORGE PECK.

San Francisco, November 27th, 1863."

On the 27th of November, 1864, the stock was only worth and marketable at twenty dollars per share. Hawley had thirty shares of his own at the time he purchased the twenty-five shares of Peck. He did not sell a share of either until the 27th of November, 1864, but soon after the purchase from Peck he had surrendered the original certificates, which were in the name of Peck, and received new certificates therefor in his own name. He then sold the twenty-five shares at the Board of Brokers, after notice to defendant, (who, by reason

[1] *Thompson* v. *Toland*, 2 M. R. 77.

of Peck's death in the interval, had been appointed administrator of his estate,) and after his claim for the deficiency had been duly presented to the administrator and rejected, brought suit therefor and recovered judgment in the court below.

On the trial, the defendant offered to prove that after the sale by Peck to plaintiff, but before November, 1864, Summer stock was worth over two hundred dollars in the San Francisco market. The evidence was excluded under the plaintiff's objection to its relevancy and competency. Defendant excepted. Defendant moved for a new trial, on the ground that the verdict and judgment were not sustained by the evidence and were against law. Motion denied, and defendant appealed from the judgment and the order denying said motion.

PATTERSON, WALLACE & STOW, for appellant.

EDWARD TOMPKINS, for respondent.

By the Court, SANDERSON, J.

We can not agree with the counsel for the appellant as to the construction of the contract. Its language is not at all ambiguous, but of plain and obvious import. In such a case we can but follow the language of the contract. We are not permitted to insert words not put there by the parties themselves. To do so would be to make contracts, not to read them. The agreement on the part of Peck is not only in terms not "on *or before*" the 27th day of November, 1864, but the agreement on the part of Hawley shows, with all the certainty of a direct statement, that the words, "or before" were not intended, for it makes it obligatory upon Hawley to keep the stock, or not to part with it, until the 27th of November, 1864. Not only that, but his keeping it until that time is expressly stated as a part consideration for the promise of Peck to make good the deficiency. It would seem to have been the understanding that Hawley should be made sure of getting two hundred dollars a share for the stock, in any event, with the privilege of holding it until the 27th of November, 1864, for a yet higher market value.

Such being the contract, it follows that testimony offered by the defendant to show that the stock was worth two hundred dollars and over per share in May, 1864, was properly rejected.

There is nothing in the second point made by the appellant. Hawley, as the testimony shows, neither exchanged nor sold the stock prior to the 27th of November, 1864. He surrendered the certificate for the stock which he received from Peck to the officers of the company for cancellation, and took other certificates therefor in his own name; but that was necessary in order to complete the transfer and make the stock his as against third persons. It was not contrary to the contract, but in keeping with it. Nor did the subsequent cancellations and issues of certificates work any change in the stock itself. The stock remained the same from first to last. Stock is one thing and certificates another. The former is the substance and the latter is the evidence of it.

Judgment and order affirmed.

Mr. Justice RHODES did not express an opinion.

THE MERRIMAC MINING CO. v. LEVY.

(54 Pennsylvania State, 227. Supreme Court, 1867.)

[1] **The contract of the subscription.** By the act of subscribing to the capital stock of an incorporated association, each associate undertakes to raise his proportion of the capital as it may be called for by the directors.

Implied duty to pay. The law authorized the directors to call in the subscription; this ordinarily implies a corresponding duty to pay.

Personal liability. The articles of association under the law, contemplated a substantial capital for defined purposes; this was both to carry out the object of the corporation and for the protection of creditors, and therefore created a personal liability for the subscriptions.

Status of assignee of stock. A purchaser from an original subscriber is substituted to his obligations as well as his rights, and, being accepted by the corporation, a privity is established between them.

Lex loci domicilii. In a suit arising under a charter of another State, the decisions in that State are the best evidence of the rights and duties of stockholders under it.

Error to the District Court of Philadelphia.

In this action, which was commenced November 4, 1865, by

[1] *Blunt* v. *Walker*, 11 Wis. 334; 78 Am. Dec. 715.

the Merrimac Mining Company of Lake Superior, to the use of their assignees for the benefit of creditors, against David C. Levy, a case was stated showing the following facts:

The plaintiffs are a corporation under an act of the legislature of Michigan, "to authorize the formation of corporations for mining, etc., and for manufacturing purposes," approved February 5, 1853, and supplements known as the "General Mining Laws of Michigan." The first meeting of the board of directors of the corporation was held February 23, 1864.

On the 30th day of March, 1864, the defendant owned 351 shares, and continued to hold not less than 200 shares up to the 4th of October, 1865, or thereabouts, when his stock was sold, as hereinafter set forth.

On the 27th of March, 1865, there had been paid in upon said stock $5.50 a share, and on that day the directors, in accordance with all the provisions of said act and supplements and the by-laws of the corporation, called for an installment of $1 upon every share, of which due notice was given to defendant, but he refused to pay the installment, and the plaintiffs, in pursuance of the provisions of said act, supplements and by-laws, and with the requisite notice to the defendant, advertised and sold his stock on the 4th day of October, 1865, for five cents a share, leaving ninety-five cents a share of the installment still unpaid.

If the defendant is liable, in the opinion of the court, to pay to the plaintiffs the balance of the installment not paid by the proceeds of sale of stock, the same being ninety-five cents a share, then judgment to be entered for the plaintiffs for the sum of $190; if otherwise, judgment to be entered for defendant.

The court below entered judgment for the defendant, which was assigned for error.

C. SERGEANT and C. GILPIN, for plaintiffs in error.

G. W. BIDDLE, for defendant in error.

The opinion of the court was delivered February 14, 1867, by STRONG, J.

The plaintiffs are a Michigan corporation, and this suit is brought to recover from the defendant, who is a transferee of stock from an original subscriber, the installments on the stock called since he became a stockholder. In *Carson* v. *The Arctic Mining Co.*, 5 Mich. 288, it was ruled that one who had signed the original articles of association, and thus subscribed to the stock of a mining company organized under a law similar to that under which these plaintiffs are organized, is liable personally for installments called while he remains a stockholder. And in a later case, decided by the same court, *The Merrimac Mining Co.* v. *Bagley*, it was held, that one who had purchased stock in the company from an original subscriber, is liable to pay such installments as are called while he owns the stock. In this latter case the law of incorporation was the same as that of the company under which the defendant held his stock. Indeed, the plaintiffs in that case and this are the same. If the decision of the Michigan court is a correct exposition of the law, the judgment in this case should have been for the plaintiffs.

We do not propose now to spend time in showing that were the defendant an original subscriber to the stock of the plaintiffs, he would be personally liable for the installments called. It is quite plain, from the articles of association, taken in connection with the general mining law of Michigan, that he would. It is true, the articles contain no express promise of the subscribers to pay installments as called, but the stock is fixed at twenty thousand shares of $25 each. By the act of subscribing, each associate undertook to raise his proportion of the capital, as it might be called for by the directors—and the directors were, by the act of the legislature, authorized to call in the subscription. A right to call, ordinarily implies a corresponding duty to pay. The act also speaks of the installment called as "becoming due." This is language appropriate to an existing debt.

There is another consideration of much importance, tending to show that personal liability was contemplated. The articles of association, under the mining law, contemplated a substantial capital raised for a defined purpose. This was not only to carry out the avowed object of the corporation, but for the protection of its creditors. If the subscribers were not bound to pay

for their stock, there is nothing more than a nominal capital. Certainly it was intended that creditors should have the security of a real capital to the extent of the sum named as the aggregate stock. But without saying more upon this subject, we refer to *Carson* v. *The Arctic Mining Company*, already cited, and to *Hartford & New Haven Railroad Co.* v. *Kennedy*, 12 Conn. 499. In the latter case a subscription to the stock of a railroad company in these words, " we do hereby subscribe to the stock of the said railroad the number of shares annexed to our names respectively, on the terms, conditions and limitations mentioned " in the resolutions of the General Assembly incorporating the company, was held to amount to an assumption to pay installments as called, and this, though the resolutions did not declare there should be any personal liability, but provided that the stock might be sold for unpaid requisitions. See also 16 Conn. 593. But if the original subscriber is personally liable for installments on his subscription called while he holds his stock, it is hard to see why a purchaser from him is not bound to pay installments called for after he has succeeded to the place of his vendor. It would seem he must be substituted to the obligations of the original subscriber, as well as to his rights. He takes the stock subject to its liabilities, and being accepted by the corporation as a stockholder, a privity is established between them. Such seems to be the doctrine of most of the authorities: *Huddersfield Canal Co.* v. *Buckley*, 7 Term R. 36; *Bend* v. *Susquehanna Bridge Co.*, 6 Harris & Johnson, 128; *Hartford & N. H. R. Co.* v. *Bowman*, 12 Conn. 530, and the recent Michigan case,[1] *Merrimac Mining Co.* v. *Bagley*.

It is argued, however, that the past decisions of this court show the law to be otherwise with us, and we are referred to *Canal Co.* v. *Sansom*, 1 Binn. 70. The main thing decided in that case, however, was that a declaration in the act incorporating a canal company, that if required installments on the stock were not paid as called, the stock should be forfeited to the company and sold by them, did not prevent the company from maintaining a suit against the defaulting stockholder, on his promise to pay, and that though it was provided, his stock should be absolutely lost to him by forfeiture. It is true, a

[1] 13 M. R. 461.

question was also raised respecting the liability of a stockholder for installments on stock for which he had not subscribed, but of which he had become a transferee, and the court (two judges present) simply remarked those shares stood on different ground, and that he had given no express promise to pay, and that the act had made no other provision than that the shares should be subject to the payments. But it appears that the obligation of the transferee was not pressed; it was given up.

Palmer v. *The Ridge Mining Co.*, is also cited; it is found in 10 Casey, 288. It certainly does bear a strong resemblance in many of its features to the present case. The decision was rested upon *Canal Company* v. *Sansom*, which, as we have seen, was not contested, so far as respects the point now under consideration. What the provisions of the act incorporating the Ridge Mining Company were respecting the liability of subscribers to stock, the report does not inform us.

Under the by-laws there was a power in the directors to declare the stock forfeited. It must be admitted, however, that there is no substantial difference apparent between that case and this. It must be held to determine the law of the precise facts then before the court. But here we have a company chartered under another law, and a law which has received a construction from the tribunal of last resort in the State that made it. In determining the duties and obligations of stockholders in this company, we think we ought to be guided by the ruling of the Michigan court. If we are not, this anomaly will be produced: some stockholders will be bound to pay installments called, and others standing in the same condition will not. Such a state of things would be unjust to those who are obliged to pay, and unjust to the creditors, if any, of the corporation. As this is a Michigan charter, existing only under the laws of that State, the decisions of Michigan courts are the best evidence of the rights and duties of stockholders under it.

Judgment reversed, and judgment for the plaintiff for $190.

ARTEMUS DAVIDSON v. IRA P. RANKIN, Executor, and FANNY GODDARD, Executrix, of E. B. Goddard, deceased.

(34 California, 503. Supreme Court, 1868.)

Personal liability not contingent. The liability of a stockholder of a mining corporation for his proportion of the company debts, as provided by statute, is not contingent on a recovery against the corporation, but the right of action against him accrues at the same time as that against the corporation.

Idem—Liability of executors[1]—Bar. It follows that it was, in the case of a decedent, a debt due at the time of his decease, and that neglect for the period limiting the presentation of claims due at his decease, will forever bar action.

Appeal from the District Court, Fifteenth Judicial District, City and County of San Francisco.

This action was brought to recover the sum of twenty-seven hundred and seventy-one dollars, alleged to be due from the testator of the defendants to the plaintiff, on a liability accrued to the plaintiff against the "Segregated Crown Point Mining Company," a corporation of which said testator was a stockholder. Plaintiff had judgment, and defendants moved for a new trial, which was denied. The defendants appealed from the judgment and the order denying a new trial.

The other facts are stated in the opinion of the court.

D. P. BARSTOW, for appellants.

It has been settled that stockholders of corporations formed under laws providing for a personal liability, like the sixteenth section of the act concerning mining corporations, stand upon the same footing in relation to the creditors as though the company was a simple partnership: *Moss* v. *McCullough*, 7 Barb. 295; *Harger* v. *McCullough*, 2 Denio, 119; *Marcy* v. *Clark*, 17 Mass. 330; *Southmayd* v. *Russ*, 3 Conn. 56; *Mokelumne Co.* v. *Woodbury*, 14 Cal. 266; *Moss* v. *Oakley*, 2 Hill, 265; *Allen* v. *Sewall*, 2 Wend. 327; *Corning* v. *McCullough*

[1] *New England Bank* v. *Newport Factory*, 6 R. I. 154; 75 Am. Dec. 688.

1 N. Y. 47; *Simonson* v. *Spencer*, 15 Wend. 548. The plaintiff's action was therefore barred, under the provisions of section one hundred and thirty of the Probate Act.

S. F. GILCHRIST, for respondent.

By the Court, SANDERSON, J.

This is an action brought by a creditor of a corporation against the executor of a deceased stockholder, to recover the proportion of the claim due, or alleged to be due, from the estate of his testator.

The cause of action in favor of plaintiff against the corporation, as appears from the evidence, was the wrongful conversion by the latter of eight shares of its capital stock, property of the assignor of the plaintiff. The conversion took place on or about the 21st day of January, 1864. Suit was brought against the corporation on the 14th of March, 1866, and judgment by default obtained on the 7th of April following.

The defendant's testator died on the 8th of February, 1864. The usual notice to creditors, requiring them to present their claims within ten months, was first published on the 12th of April, 1864.

The claim in suit was not presented until the 15th of May, 1866, and the defendant relies upon the one hundred and thirtieth section of the Probate Act as a bar to the action. That section provides, among other matters, that every claim which is not presented within ten months from the first publication of notice, shall be barred forever; provided, if it be not then due, or if it be contingent, it may be presented within ten months after it shall become due or absolute.

The question therefore is: when does a cause of action against a corporation accrue against its stockholders upon their individual liability for the debts and liabilities of the corporation contracted or incurred during the time they were stockholders? Does it accrue at the same time it accrues against the corporation, or not until after a judgment has been obtained against the corporation and the creditor has failed to collect it from the corporation? Or, in other words is the

liability of the stockholder conditional or unconditional—absolute, or contingent upon the failure or inability of the corporation to pay? The answer depends upon the construction, in part, of the sixteenth section of the act concerning mining corporations. That portion which relates to the question in hand, reads as follows: "Each stockholder shall be individually and personally liable for his proportion of all the debts and liabilities of the company contracted or incurred during the time that he was a stockholder, for the recovery of which joint or several actions may be instituted and prosecuted."

This language came before this court for construction in the case of the *Mokelumne Hill Canal Co.* v. *Woodbury*, 14 Cal. 265. Mr. Justice Cope, by whom the opinion was delivered, said: "It would seem, from a just and reasonable construction of the constitutional and statutory provisions upon this subject, that an individual corporator, in respect to his personal liability for the debts of the corporation, does not occupy the position of a surety, but that of a principal debtor. His responsibility commences with that of the corporation, and continues during the existence of the indebtedness. It is not in any sense contingent, but is declared to be absolute and unconditional. The remedial effect of these provisions, in which consists their only value, should not be impaired by construction. Similar provisions in other States have generally been construed in the same manner. It has frequently been decided that the members of a corporation, who are answerable personally for the corporate debts and liabilities, stand in the same position, in relation to the creditors of the corporation, as if they were conducting their business as a common partnership." This view is conclusive of the present question, and it follows that the cause of action in suit accrued against the defendants' testator on the 21st of January, 1864, the date at which it accrued against the corporation, and was therefore due, within the sense of the one hundred and thirtieth section of the Probate Act, on the 12th of April, 1864, at which date the notice to the creditors of the defendants' testator was first published; and, not having been presented within ten months from that date, is now forever barred.

Under this view, the remaining points become immaterial.

Judgment and order reversed, and new trial granted.

SHERIFF ET AL. V. GLOBE OIL CO. ET AL.

(7 Phila. 4. Common Pleas of Philadelphia. 1868.)

Parties in personal liability suits. Under the Manufacturing Company Act of July 18, 1863, a bill can not be filed against the corporation and the officers, to enforce the individual liability of the latter, but against the officers only.

The bill must be filed by the creditors in behalf of themselves and all other creditors of the corporation.

Multifariousness. A bill which joins defendants, some of whom are liable to one plaintiff only, some of whom are liable to another, and some of whom are responsible, if at all, for independent violations of the statute, falls within the definition of multifariousness.

BREWSTER, J.

This is a demurrer to a bill in equity filed under the 42d section of the act of July 18, 1863, (Br. Dig. 1350, Sec. 42,) providing a remedy for creditors of insolvent manufacturing companies. The complainants charge that the Globe Oil Company is a corporation organized under said act, that they are judgment creditors thereof, and that their executions have been returned "unsatisfied." It is further averred that on the 1st day of September, 1864, six of the defendants, as directors of the company, declared a dividend without having "the sum necessary to pay the said dividend," whereby the corporation was rendered insolvent.

The bill then charges the election of a new board, May 1, 1865, retaining but one of the former directors, and it is averred that the members of the first board did, in September, 1864, neglect, and that the members of the second board did, in September, 1865, neglect to sign and deposit the certificate of the amount of stock paid in, etc., as required by the 33d section of act of July 18, 1863: Br. Dig. 1350, Sec. 33.

The prayer of the bill is that defendants be decreed to pay the claims of the complainants.

We only deem it necessary to notice a few of the grounds assigned in the demurrers.

The first of these is that the bill is improperly filed against the company and the officers.

The section of the law under which this bill is filed authorizes one of two proceedings:

1st. Against the corporation "and all the stockholders therein at the time of the commencement of the suit in which the judgment was recovered;" or

2d. "Against all the officers liable for its debts and contracts."

This bill can not be placed in either of these classes, for it is against the corporation and the officers, a joinder which is not only not authorized, but which seems to be forbidden by the spirit of the act.

As this is a remedy imposing a new and severe penalty, those who would avail themselves of the favor of the statute must accept its terms and pursue its directions implicitly.

Another objection is that the bill is not filed by the complainants on behalf of themselves, "and all other creditors of the corporation," as required by the act. This would also appear to be a departure from the statute.

The third difficulty in the way of the complainants is that their bill joins defendants, some of whom are only liable to but one plaintiff, some are liable under one section, and others are responsible, if at all, for independent violations of the statute. This would seem to fall directly within the terms of the definition of multifariousness given by Mr. Justice Story, Eq. Pl., Sec. 271: "The improperly joining in one bill distinct and independent matters, and thereby confounding them, as, for example, the writing in one bill of several matters, perfectly distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill."

We are aware that the strictness of the original rule upon this subject has been considerably relaxed, Lord Cottenham declaring that it was "utterly impossible to lay down any abstract proposition as to what constitutes multifariousness, which can be made universally applicable."

The substance of the rules upon the subject of multifariousness, says Mr. Perkins, "appears to be that each case is to be governed by its own circumstances, and must be left in a great measure to the sound discretion of the court." See the cases cited in note to Daniell's Ch. Pr., Vol. 1, p. 343, edition of 1865.

The most favorable case upon this point for the complainants is *Walsham* v. *Staunton*, 33 Law J. Rep., N. S. Chanc. 68, in which the Lord Justice reversed the decision of Vice Chancellor Wood, in the same case, 1 Hemming & Miller, 322, and sustained a bill charging two distinct injuries from a common fraud.

In the case now before us, however, the plaintiffs contend that certain of the defendants are liable for the debts of the company existing when a certain dividend was declared, September 1, 1864, and for all thereafter contracted, so long as that board continued in office, viz., until May 1, 1865. Now, the claim of one of the plaintiffs was not contracted until one month after the latter date, viz., on the first day of June, 1865.

The plaintiff, when confronted with this difficulty, answers that at all events these defendants are liable for not filing the certificate, as required by the 14th section of the law. But the moment he plants his foot upon that remedy the other defendants object that, as they were not elected until May 1, 1865, they are not liable for the sheriff's debt contracted months before they came into office. The penalty for not recording the certificate, unlike the other punishment, applies only to future debts.

It will thus be seen how impossible it is to unite all these defendants upon a common platform, and a review of many of the cases would seem to lead the mind to the conclusion that this bill can not be sustained. See the citation, 1 Danl. Ch. 346, 350.

Bill dismissed.

FRANKS OIL CO. v. MCCLEARY.

(63 Pennsylvania State, 317. Supreme Court, 1869.)

No personal liability for assessments. The act of July, 1863 (for incorporating mining companies) does not make a transferee of stock personally liable to pay assessments.

[1] **No implied promise.** No implication of a personal promise of the transferee to pay assessments arises.

[1] Followed, *Messersmith* v. *Sharon Bank*, 96 Pa. St. 440.

Company to follow the stock. The company can indemnify themselves only by a sale of the stock and pursuit of the original subscriber.

From the voluntary payment of one assessment by the transferee, a promise to pay others can not be inferred.

Error to the Court of Common Pleas of Fayette County.

This was an action of assumpsit, brought May 22, 1867, by the Franks Oil Company against William McCleary, to recover the sum of $125, assessments on stock in the plaintiffs' company, for which it was alleged the defendant was liable.

In December, 1864, a joint stock association was formed under the name of the Franks Oil Company, the capital being divided into shares of $100 each. H. T. Jaco subscribed for five shares, on which he paid an assessment of $12.50 each. On the 8th of April, 1865, the directors made another assessment of $25 per share. On the 20th of May, 1865, Jaco transferred two of his shares to the defendant, who paid the assessment of $25 on each of the two shares. On the 9th of June, 1865, another assessment of $25 was made by the directors, and on the 11th of September a fourth assessment of $37.50 was made. On the 19th of September the defendant transferred his two shares to Philip Fields. On the 30th of April, 1866, the plaintiffs were incorporated under the general act of July 18, 1863, Pamph. L. (of 1864), p. 1102. Section 17 of the act provided that if the proprietor of any share neglected to pay an assessment for thirty days after it is payable, the treasurer might sell by auction a sufficient number of shares to pay all the assessments due, with the necessary charges thereon, etc.

This suit was brought to recover the last two assessments on two shares amounting in the whole to $125.

The plaintiffs asked the court to charge, that all the assessments on the McCleary stock being due and payable before the transfer to Fields, McCleary is liable; and further, that the payment by McCleary of the assessment of April 8, 1865, is an acknowledgment that he took the stock subject to unpaid calls.

The court (GILMORE, P. J.) charged: "We have no articles of association given in evidence in this case; we know nothing of the design, object or government of the association prior

to its incorporation. They carried on for some years before they were incorporated. All the stock was subscribed; this transfer from Jaco to McCleary, and from McCleary to Fields, was made before the incorporation, which was on the 30th of April, 1866. If you are satisfied that McCleary transferred his stock to Fields before the act of incorporation, he was never a corporator, and not liable in this action. Again, if he is a member of the incorporation, he was such member by transfer of stock, and not personally liable, and could not be sued for the installments unpaid. This is in answer to defendant's first and second points, and renders it unnecessary to give you any further instructions. In answer to plaintiffs' point, we say, that if we are correct in holding that defendant is not liable, any instruction on this point could have no bearing upon the case."

The verdict was for the defendant. On the removal of the case to the Supreme Court, the plaintiffs assigned the following errors:

The court erred—

1. In charging "If you are satisfied that McCleary transferred his stock to Fields before the act of incorporation, he was never a corporator and not liable in this action.

2. "If he is a member of the incorporation, he was such member by transfer of stock and not personally liable, and could not be sued for the installments unpaid."

3. In not affirming plaintiffs' point.

E. CAMPBELL, for plaintiffs in error.—The original subscriber was liable, and his transferee is substituted to his liabilities: *Merrimac Co* v. *Levy*, 4 P. F. Smith, 227; Angell & Ames on Corp. § 534; *Highland Turnpike* v. *McKean*, 11 Johns. 98; *Dutchess Cotton Man. Co.* v. *Davis*, 14 Id. 238; *Spear* v. *Crawford*, 14 Wend. 20; *Troy Turnpike* v. *McChesney*, 21 Id. 296; *Birmingham Railway* v. *Locke*, 1 Q. B. 256; *Harlem Canal* v. *Seixas*, 2 Hall, 504; *Small* v. *Herkimer Co.*, 2 N. Y. 339; *Worcester Turnpike* v. *Willard*, 5 Mass. 80.

T. B. SEARIGHT, for defendant in error.

The opinion of the court was delivered January 3, 1870, by THOMPSON, C. J.

There is nothing in the act of the 18th of July, 1833, under which the plaintiff was created a corporation, nor in any by-law of the company, or the precedent association out of which it was created, brought to our notice, which makes it an incident of receiving a transfer of assessable stock, that the holder thereof becomes personally liable to pay the assessments which may be made by the company. The cases of *The Canal Co.* v. *Sansom*, 1 Binn. 70, and *Palmer* v. *The Ridge Mining Co.*, 10 Casey, 288, show that this is not the case; that no implication of a personal promise arises therefrom. In those cases, as well as that in hand, the company could only indemnify itself by a sale of the stock, and pursuit of the original contractor with the company for the stock. If a company wish for more than this security, it ought to provide for it in the act of incorporation, or, perhaps, in the certificate itself. The defendant in this case received a transfer of the shares in question from the original subscriber to the association, and transferred them before the company was incorporated. It is not necessary to consider whether this would have any effect in the case; certainly it would not aid the company, nor does it hurt the defendant. Treating the case as if the company were incorporated at the time of defendant's transfer—and it can ask no more, our judgment is, that no action lies against the defendant personally for the unpaid assessments called. Nor is it to be inferred from his voluntary payment of one assessment. The company was not injured, or he estopped by that. The case of *The Merrimac Mining Co.* v. *Levy*, 4 P. F. Smith, 227, is not in conflict with these views. We decided that case on a Michigan charter, and considered ourselves, bound by the decisions of their Supreme Court, otherwise, as we said, "some stockholders will be bound to pay installments called, and others, standing in the same position, will not;" dependent on the forum administering the law in or out of the State.

We consider it unnecessary to examine the authorities referred to, in this respect, on both sides of the able arguments in this case, for we have the rule, which must govern us in our own cases, cited above. Seeing no error in the rulings of the learned judge complained of, we must affirm the judgment.

Judgment affirmed.

WHEELER, Respondent, v. GARCIA, Appellant.

(40 New York, 584. Court of Appeals, 1869.)

[1] **Breach of stock contract—Tender, when not necessary.** Where a contract is made for the delivery of certain shares of mining stock at a future day, it is not necessary for the purchaser to make an actual offer or tender of the money at the time and place, in order to sustain an action for breach. If the demand be properly and sufficiently made, and the purchaser be prepared to pay at the time and place, this is sufficient.

The plaintiff brings this action to recover damages for the non-delivery of 1,000 shares of the capital stock of the Downieville Gold Mining Company pursuant to a contract made on the 24th day of May, 1866; and also for non-delivery of the same number of shares of the stock of the same company pursuant to a contract made on the 12th day of June, 1866. Both contracts are alleged to have been made by the defendant with Geo. P. Hart & Co., for the benefit of the plaintiff, and to have been assigned to him, and they were, respectively, for the delivery of the shares "at seller's option, sixty days." At the close of the evidence, the defendant's counsel "moved to dismiss the complaint, on the ground that plaintiff had not proved an offer or tender of his money with the demand," which motion was denied and the defendant excepted. Exceptions were taken to the exclusion of testimony, which are referred to in the opinion of the court. No exceptions were taken to the charge, and no requests to charge were presented. The jury found for the plaintiff, $4,873.63. The judgment upon the verdict was affirmed by the General Term of the first district. The defendant now appeals to this court.

HENRY WHITTAKER, for appellant.

STEPHEN P. RUSSELL, for respondent.

HUNT, Ch. J.

Many questions are argued by the briefs of the parties,

[1] *Forsyth* v. *North Am. Oil Co.*, 11 M. R. 115; *Rhynd* v. *Hyndman*, 3 M. R. 166; *Wynkoop* v. *Seal*, 13 M. R. 493.

which do not arise upon the case as it is presented in this court. Questions of law strictly, upon exceptions taken or questions made at the trial, are all that this appellate court can consider, and these in the precise form in which they appear upon the record. In the present case, the defendant moved to dismiss the complaint (for a non suit in substance) on the ground that the plaintiff had not proved an offer or tender of his money with the demand. This assumes that a demand was made, in proper form, and at the proper time, as to each contract, and that the plaintiff was claimed to be at fault only in not then tendering the money. It is not competent to the defendant, after assuming the contrary at the trial, and permitting the plaintiff and the court to act upon that assumption, now to say that there was no sufficient demand: *Binsse* v. *Wood*, 37 N. Y. 526. The elaborate argument of the appellant that the plaintiff was bound to prove a demand of performance by the defendant at the time specified in the contract, will not therefore avail him. He is limited to the ground taken on the trial, to-wit: That no offer or tender of the money was made with the demand. Neither does the question arise that the verdict is unsupported by evidence. No request was made for a decision on that point, and none was given. The defendant chose to take his chance with the jury upon the facts shown, and no legal question is presented on which he can ask our interposition. The objection of not tendering the money I will now consider. The defendant agreed to deliver the shares of stock at such time as he should think fit, within sixty days. and the plaintiff agreed to pay him therefor the price specified in the contract. The defendant not tendering the shares of stock himself, the plaintiff requires him to deliver them, and he testifies that, at the time of this demand, he was ready to pay the price agreed upon if the defendant had delivered them. The defendant replied to the demand that he could not; he was not able. Under the circumstances it was not necessary to make an actual production and formal tender of the money; it would have been an idle ceremony.

Assuming that the demand was properly and sufficiently made, and that, at the time and place of making the same, the plaintiff was ready and prepared to pay on his part, the cases of *Coonley* v. *Anderson*, 1 Hill, 519, 523, and of *Bronson* v. *Wi-*

man, 4 Seld. 182, are clear authorities that the plaintiff was not bound to make an actual production and offer of his money.

The exclusion of certain evidence is complained of, which it is said should have been admitted as tending to sustain the second defense set up in the answer. That defense contained an allegation that the plaintiff and Hart, his broker, conspired with each other, falsely and fraudulently to make it known that the company in question was solvent, and that its shares were of great value, when the company was not solvent and the shares were not of any real value. It was further alleged that the same parties caused to be issued a large number of fraudulent and spurious shares of the said stock, and did represent the same as good and valid shares of stock. The plaintiff, Wheeler, being under cross-examination, the defendant's counsel put to him the following questions: Were you not operating in a pool to control the whole of the Downieville gold mining stock? Ans. Do you mean as one of the pool, or a party in the pool? Defendant's counsel: Yes, sir. Ans. No, sir, I never was a party in the pool. Ques. Was not that stock controlled by a pool? Objected to; sustained and exception. It seems to be assumed in these questions, that to be a party to a pool is a criminal or at least a disreputable position. It may be or it may not be. Whatever was its character, the plaintiff testified that he had nothing to do with it, and there was no occasion to further prosecute the inquiry.

The inquiry proceeds thus: Ques. Between the 24th of May, the time of making this first contract, and the 5th of November following, at the time the price of the stock appears to be nearly three dollars a share, did you not either yourself or in combination with other persons, claim to control the shares to the entire amount of the capital stock of this Downieville gold mining company, and have you not so stated? Ans. Well that is a difficult question for me to answer; your question covers a good deal of ground; there are three questions in one. The question is repeated. Objected to; objection sustained and exception.

The question was not whether the plaintiff did actually control the stock. Whether he claimed to control the shares of this stock, or whether he had so stated, was quite immaterial. The defendant had agreed to deliver certain of the shares at a

price fixed, and had failed to do so. Whether the plaintiff boasted that he controlled the entire capital of the company, was not of the least importance to the question involved in the trial. There was no issue in relation to such claim in the pleadings, nor any legitimate question on the trial.

At a subsequent re-cross examination of the same witness the defendant's counsel asked him these questions: Did it not (the price of the stock in question) fall almost immediately after November 5th? Ans. It fell in November. Ques. To a great extent? Ans. Yes, sir. Ques. And did it fall below forty cents a share? Ans. During the month of November I think it did. Ques. What occasioned the fall? Objected to; objection sustained and exception. It is claimed, if I understand the argument, that this evidence was competent under the second answer, as tending to show a fraudulent conspiracy by the plaintiff and others, to elevate the stock in question. I do not perceive how it shows it or tends to show it. The price of the stock fell during the month of November. How could this fact, or the inquiry of what occasioned its fall, tend to show that the plaintiff had made false representations as to its value, or that he had aided in an over-issue of its shares. There is no connection between the circumstances. No such object or connection was avowed on the trial, and the defendant can not now put forth what he did not there pretend.

The doubtful questions on the trial were the questions of fact. These were sharply contested, and the jury found them against the defendant.

The judgment should be affirmed with costs.

DANIELS, J., filed a dissenting opinion.

MASON, GROVER, LOTT and MURRAY, JJ., concurred with HUNT, Ch. J., for affirmance.

JAMES, J., concurred with DANIELS, J., for reversal.

WOODRUFF, J., did not vote.

Judgment affirmed.

FIRST NATIONAL BANK OF PLYMOUTH v. PRICE ET AL.

(33 Maryland, 487. 3 American R. 204, Court of Appeals, 1870.)

[1] **Personal liability statute not enforced extra-territorially.** A Pennsylvania statute limited the amount of the lawful debts (not including capital stock) of certain companies to the amount of their capital actually paid in, and further provided that "if any debts or liabilities shall be contracted exceeding the said amount, the directors and officers contracting the same, or assenting thereto, shall be jointly and severally liable, in their individual capacities, for the whole amount of such excess, and the same may be recovered by action of debt as in other cases." In an action to recover for a violation of this statute: *Held*, that the liability so created was in the nature of a penalty, and not enforcible outside of the State which enacted the law.

Action of debt under a statute of the State of Pennsylvania. The facts appear in the opinion of the court.

WILLIAM S. WATERS and GEO. W. WOODWARD, for appellant, argued that the liability of the company arose from the contract and was not in the nature of a penalty: *Morgan* v. *N. Y. & A. R. R. Co.*, 10 Paige, 290; Ang. & Am. on Corp. §§ 579–611; *Corning* v. *McCullough*, 1 N. Y. 66, 71; *Ex parte Van Riper*, 20 Wend. 616; *Van Hook* v. *Whitlock*, 3 Paige, 415; *Allen* v. *Sewall*, 2 Wend. 339; *Marcy* v. *Clark*, 17 Mass. 334; The liability of the individual members of the company exists at common law only so far as the law restricts it: *Bailey* v. *Bancker*, 3 Hill, 189, and cases before.

JOHN CARSON and JOHN STEWART, for appellee.

BARTOL, C. J.

This suit was instituted by the appellant against the appellees, as officers and directors of "The Consumers' Union Coal Company," a corporation created under the laws of the State of Pennsylvania.

The case comes before us upon general demurrer to the declaration, and the only question to be decided is, whether the

[1] *Nimick* v. *Mingo Iron Works*, 25 W. Va. 184.

liability for the debts of the corporation imposed upon the officers and directors by the law of Pennsylvania of March 30, 1860, can be enforced by an action of debt in this State.

The provisions of the statute which are substantially set out in the declaration, are as follows:

"In order the better to limit and restrict the amount of liabilities to the actual capital of all companies formed under the Act to enable joint tenants, tenants in common and adjoining owners of mineral lands in this commonwealth to manage and develop the same, approved the 21st day of April, 1854, and to provide for the protection of both the creditors and stockholders thereof, the total amount of the debts and liabilities (other than its capital stock) of any such company, shall never exceed the amount of its capital actually paid in; and if any debts or liabilities shall be contracted exceeding the said amount, the directors and officers contracting the same, or assenting thereto, shall be jointly and severally liable, in their individual capacities, for the whole amount of such excess, and the same may be recovered by action of debt as in other cases."

It is alleged in the declaration that the indebtedness of the corporation to the appellant was, at the time the same was contracted, "in excess of the capital stock actually paid in, and that the defendants were then directors and officers of the corporation, and assented to the contracting of said debts."

The case stated comes within the provisions of the statute, and if this suit had been instituted in Pennsylvania, there could be no doubt of the right of the plaintiff to recover. But the question here is, can the liability imposed by the statute be enforced out of the limits of Pennsylvania? This depends upon the nature of the liability and the manner in which it is created. Does it arise upon contract, or is it in the nature of a penalty created by the statute, and imposed upon the defendants as wrongdoers?

The decision of the case turns upon the proper solution of these questions; for, while a contract made in one State is enforced in other States agreeably to the law of the State where it is made, it is well settled that no State will enforce penalties imposed by the laws of other States; such laws are universally considered as having no extra-territorial operation or effect.

These general principles were conceded in the argument, and we need not cite authorities in their support.

To ascertain the nature of the responsibility here sought to be enforced, and to determine whether it arises upon contract or is one imposed by the statute by way of penalty, we must at last refer to the provision of the statute itself, and ascertain its true construction and effect.

Before doing this, we will refer to some of the cases cited in argument, in which the courts of other States have considered the nature of the liability of stockholders and officers of corporations, growing out of statutory provisions similar to the one before us.

It has been decided by the courts of New York in several cases, and seems now to be there well settled, that where, by a statute, it is provided that the individual corporators shall be jointly and severally liable for the debts of the corporation, such liability is not in the nature of a penalty, but may be enforced as a contract: *Corning* v. *McCullough*, 1 N. Y. 47; *Allen* v. *Sewall*, 2 Wend. 338; *Moss* v. *Oakley*, 2 Hill, 265; *Bailey* v. *Bancker*, 3 Id. 188; *Harger* v. *McCullough*, 2 Denio, 119. Other cases might be cited to the same effect.

In *Ex parte Van Riper*, 20 Wend. 614, it was held that such a liability, arising under an act of incorporation of the State of New Jersey, might be enforced, by a suit, in the State of New York.

The ground upon which those decisions rest, as succinctly stated by Judge Bronson in *Corning* v. *McCullough*, is that in such cases "the stockholders stand substantially upon the same footing as though they had been partners, or an unincorporated association; that they were answerable to the creditors of the company, as original and principal debtors, though the creditors were first to exhaust their remedy against the corporation."

These cases have been relied on by the appellant, in argument, as analogous to this, and it is contended that the liability of the defendants in this suit is of the same kind.

On the other hand it has been contended by the appellees' counsel that the liability imposed by the Pennsylvania statute, now under consideration, and which is here sought to be enforced, is not an original responsibility for the debts of the

corporation *eo nomine*, but is one imposed by the statute for a violation of its provisions, or a breach of duty on the part of the directors, in contracting debts of the corporation "exceeding the amount of its capital actually paid in." The liability is "*for the amount of such excess*," and therefore it is contended that it springs, not out of the contract of the parties, but is in the nature of a penalty imposed by the statute.

In support of this view, we have been referred to a number of cases in which it has been held that where a statute enjoins a duty to be performed by the officers of a corporation, and in case of a failure on their part to perform such duty, makes them individually liable for the debts of the corporation, such liability is in the nature of a penalty. To this class of cases belong *Garrison* v. *Howe*, 17 N. Y. 458; *Andrews* v. *Murray*, 33 Barb. 354; *Shaler Quarry Co.* v. *Bliss*, 34 Id. 309; *Boughton* v. *Otis*, 21 N. Y. 261; *Squires* v. *Brown*, 22 How. Pr. 45; *Halsey* v. *McLean*, 12 Allen, 438; *Lawler* v. *Burt*, 7 Ohio St. 341; *Derrickson* v. *Smith*, 3 Dutch. 166; *Harrisburg Bank* v. *Com.*, 26 Pa. St. 451.

In *Halsey* v. *McLean*, and *Derrickson* v. *Smith*, it was held that in such cases the liability can only be enforced in the State enacting the statute.

In each of these cases the suit was brought against the trustees of a manufacturing corporation created under the law of New York, which required the corporation to make and publish a report at a certain time, annually, signed and verified as prescribed, stating the amount of its capital and of the proportion actually paid in, and the amount of its existing debts; and enacted that "if any of said companies shall fail so to do, all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made."

In construing the statute the Supreme Courts of Massachusetts and New Jersey decided that the liability of the trustees was in the nature of a penalty imposed on them for the violation of official duty, and could not be enforced out of the limits of New York.

The counsel for the appellant in their argument endeavored to distinguish the cases of *Halsey* v. *McLean* and *Derrickson* v. *Smith*, from the case before us, upon the ground that under

the New York statute the liability of the trustees was not contemporaneous with the creation of the debts, but arose from a subsequent breach or failure of duty on their part.

This is true so far as regards the existing debts of the corporation, created before the failure to make the report. But the statute makes them liable in the same way for any debts they may contract after the failure to report, and before such report shall be made; it is clear that under this last provision the liability of the trustees would arise at the time of creating the debts; and yet in the cases no distinction is made as to the nature of the liability under the statute for existing debts, and for such as might be contracted after the breach of duty had been committed.

It is manifest that the responsibility imposed by the statute upon the trustee is of the same kind for both classes of debts, and that it arises, not out of the contract by which the debts are created, but from matters entirely collateral thereto, and resting entirely on the provisions of the statute.

In *Lawler* v. *Burt*, 7 Ohio St. 341, the suit was by a creditor of the corporation against the individual stockholders to enforce a liability which arose as follows:

By a statute of March, 1839, it was enacted that every corporation, except an incorporated bank, that shall issue notes designed to circulate as money, shall be deemed an authorized bank, within the meaning of the act of January 27, 1816.

By the 11th section of the act of January 27, 1816, it was enacted that every stockholder, shareholder or partner, hereafter interested in any such bank, shall be jointly and severally answerable in their individual capacity for the whole amount of the bills, bonds, notes and contracts of such bank, etc.

By the 12th section the holder of the notes was authorized to institute suit and recover judgment thereon against any part or the whole of the persons who were interested in such bank at the date of such notes, etc.

The case came within these provisions, and the plaintiff sued as holder of the notes. The defendants plead the Statute of Limitations, and the question before the court was, whether the case fell within those provisions of the statute relating to actions upon contracts, or those which limited the time of suits to recover penalties and forfeitures. It was decided that

the liability was in the nature of a penalty, and did not arise upon contract. That case was in principle very analogous to the case before us. There it was argued that the individual responsibility of the defendants upon the notes existed under the statute at the time of their issue, and that they were bound in the same manner as if they had been the makers of the notes. But that argument did not prevail; the court held that the liability under the statute was for a tort, and not in contract.

The case of *Kritzer* v. *Woodson*, 19 Missouri, 327, involved the question of the nature of the liability of directors of a corporation, under a statutory provision, exactly like the one before us. The statute declared "that the whole amount of debts of any corporation, except banking companies, shall not exceed the amount of its capital stock actually paid in, and in case of any excess, the directors, under whose administration it shall happen, shall be jointly and severally liable, to the extent of such excess, for all the debts of the company then existing, and for all that shall be contracted, so long as they shall respectively continue in office, and until the debts shall be reduced to the said amount of the capital stock."

The suit was against the directors to recover the excess, and the court decided that the liability imposed by the statute was in the nature of a penalty. The question arose as in *Lawler* v. *Burt*, under the plea of the Statute of Limitations, and was decided in the same way. That decision as it was made upon a statute in the same terms as the one now under consideration, is directly in point, and, so far as it may be taken as authority, supports the position of the appellees in this case.

We will conclude our reference to decided cases by citing the decision of the Supreme Court of Pennsylvania in *Hill* v. *Frazier*, 22 Penn. 320. That being the ruling by the court of last resort in the state in which the statute before us was enacted, upon the construction of a statutory provision somewhat analogous, is entitled to great weight in determining the present case.

There the suit was brought against a director of a manufacturing company to recover a debt due by the company.

By section 14 of the act of April 7, 1849, it was provided that "dividends of so much of the profits of any such company

as shall appear advisable to the directors shall be declared in the months of June and December annually, and paid to the stockholders or their legal representatives, at any time after the expiration of ten days from the time of declaring the same; but the dividends shall in no case exceed the amount of the net profits actually acquired by the company, so that the capital stock shall never be impaired thereby, and if any dividend shall be declared and paid which shall impair the capital stock of said company, the directors consenting thereto shall be jointly and severally liable, in their individual capacities, for all the debts of the company then existing, and all that shall thereafter be contracted, as long as they respectively continue in office." (Then follows a proviso not material to be noticed.) Purdon's Digest, 692, 693.

In *Hill* v. *Frazier*, the question of the nature of the liability of a director under this statute was considered. The plaintiff was a creditor of the company, and had assigned his claim to Eldred, for whose use the suit was instituted. It was contended on the part of the defense that, being for a penalty, the claim was not assignable; to this it was answered by the court (page 324), "that we see nothing in the nature of the claim itself which prevented the holder from assigning it. It was not, as the defendant insists, a mere penalty. It was a debt due from the company to Frazier, which he might transfer like any other debt, and the assignee was entitled to all the remedies for its recovery which the original creditor would have had." This point involved the right of the assignee, and it was decided that the thing assigned was not a mere penalty but a debt of the company, in its nature assignable.

In the same case a question arose as to the competency of the stockholders as witnesses for the plaintiff, and in disposing of that question the court considered the nature of the defendant's liability, and decided that they were incompetent, because, by a recovery against the defendant, "they would be forever clear of it." "The defendant," says the court, "has no right of subrogation. He is sued as a wrongdoer, and wrongdoers have no recourse over against those in *pari delicto*, or against anybody else." (Page 323.)

That decision conclusively shows that the court, in constru-

ing the statute before them, held that the liability of the director was not one arising upon contract, but one imposed upon him by the statute as a wrongdoer, and therefore in the nature of a penalty.

When we examine the provision of the statute now under consideration we are struck with the very close analogy between it and the law construed in *Hill* v. *Frazier;* there, the liability of the director arose from his consenting to the declaring of a dividend exceeding the amount of the net profits actually acquired by the company; here, the liability arises from consenting to contract debts exceeding the amount of the capital stock actually paid in. In each case the liability is one created entirely by the statute, and imposed on the directors as wrongdoers.

It appears, in the report of *Hill* v. *Frazier*, that the debts of the company there sued on were contracted after the unlawful dividend had been declared, and therefore the liability of the defendant under the statute accrued at the time the debts were contracted. The case is in many respects very analogous to this, and we think is a strong authority in support of the conclusion we have reached as to the true construction of the statute of March 30, 1860. By that law the directors are forbidden to contract debts of the corporation exceeding the amount of its capital stock actually paid in, and if they do so they are made liable individually for the excess. This liability does not arise upon any contract to which the directors are parties, but is altogether statutory, imposed on them as wrongdoers, and in its nature penal, and, as such, can only be enforced within the State where the statute operates.

In our opinion the judgment of the court below is correct, and ought to be affirmed.

Judgment affirmed.

WYNKOOP V. SEAL.

(64 Pennsylvania State, 361. Supreme Court, 1870.)

Liability to broker for purchased stock—Readiness to deliver. [1] Seal, a broker, bought stock on the order of Wynkoop, paid for it, and informed him of the purchase. The stock was delivered to Seal; he frequently asked Wynkoop to take the stock, and although there might have been times when no stock was in his name, he could at any time have delivered it to Wynkoop, who never requested a delivery: *Held*, that Seal could recover for the money advanced, and that Wynkoop was estopped from alleging that Seal could not comply, never having offered payment or demanded delivery, and Seal being ready to deliver at the time of trial.

Idem—Temporary transfer of the stock by the broker. It was not error to refuse to charge that plaintiff could not recover because at some intermediate time the broker had not the stock standing in his name or had temporarily hypothecated it.

[2] **Shares of stock are alike** and a transfer thereof procured to be made by another would be a compliance with a contract to deliver.

Immaterial error will not justify reversal.

Error to the District Court of Philadelphia.

This was an action of *assumpsit* commenced January 6, 1869, by Lewis Seal against John E. Wynkoop, to recover the price paid by the plaintiff, who was a broker, for stock bought for the defendant at his request. The declaration averred that the order to the plaintiff was for the purchase of stock in "The McClintock Oil Company."

The case was tried May 4, 1869. D. J. Woods testified for the plaintiff that about February, 1865, at the request of the defendant, he introduced him to the plaintiff and the defendant instructed the plaintiff to purchase for him 200 shares of McClintock oil stock; he paid the plaintiff $200. The witness was then asked, "Do you know from conversation with Mr. Wynkoop whether he knew that this stock was purchased by the plaintiff as instructed by him?" The defendant objected on the ground that the witness was asked for his "*impression*," etc. The objection was overruled and a bill of exceptions sealed. The witness answered: "I can not say that

[1] *Wheeler* v. *Garcia*, 13 M. R. 481.

[2] *Hawley* v. *Brumagim*, 13 M. R. 465; Note, 75 Am. Dec. 319.

he said anything of that kind in so many words. He did intimate to me that the stock had been bought. I knew he was informed of the purchase. I have no doubt that he did intimate to me that the stock was bought for him. I conversed with the defendant after the purchase of the stock, probably the same day, about the purchase of the stock. I think I received telegrams from defendant to plaintiff in relation to this transaction."

The telegrams, as follows, were then given in evidence:

"POTTSVILLE, March 30, 1865.

To LEWIS SEAL, Esq., Stock Broker:

I was down yesterday but left unexpectedly; will be down again to see you on Saturday.

JOHN E. WYNKOOP."

"POTTSVILLE, March 30, 1865.

To LEWIS SEAL, Esq., Broker:

Yours has just been received. Extend my McClintock 30 days. I will see you on Saturday.

JOHN E. WYNKOOP."

The plaintiff testified: On the 28th of February, 1865, the defendant ordered him to buy 200 shares of McClintock oil stock, and paid $200 at the time; he bought 200 shares, which, with expenses, etc., cost $1,275.25; he had received dividends to the amount of $95. The defendant was informed of the purchase when made, and had been frequently requested to take the stock and pay for it; there never was a time when the plaintiff could not have delivered the stock; it was always under his control; it was bought for the defendant on 30 days' credit to the buyer; it did not pass at the time of the purchase from the seller.

The plaintiff produced a certificate in his own name, dated May 3, 1869, for 200 shares of stock in "The McClintockville Petroleum Company." He further testified that he had his stock in larger certificates and got the certificate of 200 shares, on the 3d of May, out of a certificate of 500 shares; he had bought stock in the same company before and after he bought for defendant; there might have been times when there was no stock in his name; he may have borrowed money on it; this stock was delivered to him April 10, 1865; he never gave defendant notice that the stock was ready.

The defendant gave no evidence.

He requested the court to charge:

1. That if the jury believe from the evidence that there was no notice given to Mr. Wynkoop of the plaintiff having the stock ready to deliver, the plaintiff can not recover.

2. That there have been no damages proved, and therefore the verdict must be for defendant.

3. That if the jury believes from the evidence that the plaintiff did not have 200 shares of the stock of the same company always in his possession, ready to deliver to the defendant, but on the contrary, had, during that time, pledged or in any way disposed of all he had of said stock, the verdict must be for defendant.

4. That the stock alleged to have been ordered by defendant being "McClintock Oil Stock" and the stock proved to have been ordered being "McClintockville Petroleum Company" stock, there can be no verdict for plaintiff.

The court refused each of the points.

The verdict was for the plaintiff for $980.25.

The defendant took a writ of error. He assigned for error the admission of the evidence objected to, and the refusal of his points.

G. M. DALLAS, for plaintiff in error.

J. R. RHOADS, for defendant in error.

The opinion of the court was delivered March 10, 1870, by AGNEW, J.

This is the case of an agent who has bought stock for his principal, and paid his own money for it, claiming to recover the sum that he has advanced for his principal. Seal testified that he had bought and paid for the stock at the request of Wynkoop, and informed him immediately of the purchase. He repeatedly requested Wynkoop to come and take the stock and pay for it. Seal also testified that there never was a time when he could not have delivered the stock to Wynkoop; it had always been under his control. He stated on cross-examination that there might have been times when there had been no stock in his name on the books of the company, and also

that he might have borrowed money on it. He repeated, however, that there had not been an hour since his purchase of the stock, that Wynkoop could not have got it. On the trial, Seal produced a certificate for 200 shares, the number he was requested by Wynkoop to buy. There is no evidence that Wynkoop ever called to take the stock, to make payment, or to request a delivery of it. He seems to have left his agent to carry the stock for him without any effort to relieve him. Under these circumstances the defendant's counsel asked the court to charge that if the plaintiff had not always in possession the 200 shares of stock ready to deliver to the defendant, but on the contrary, had, during that time, pledged, or in any way disposed of all he had of the stock, the verdict must be for the defendant. The refusal of the court so to charge, is the principal error complained of. The case we have, then, is an advance of money by one man, at the request and for the benefit of another; and a notice of the purchase and demand of payment, and to take the stock when the agent was unquestionably able to perform his undertaking. Now clearly, it does not lie in the mouth of the principal to say that his agent could not comply, when he never offered payment or demanded delivery of the stock. The readiness of the plaintiff to comply at the time of the trial was evidenced by production of the requisite number of shares, and his crediting the principal with the dividends. Clearly it was not error, therefore, to refuse to say to the jury that the plaintiff could not recover because at some intermediate time the agent had not that much stock standing in his own name on the books of the company, or because he might temporarily have hypothecated it. The true test of his ability to deliver the stock would have been a tender of payment and a request for delivery. Had the request been made he might have shown his ability to control so much stock, and had the transfer made. Shares of stock are alike, and a transfer procured to be made by another of the requisite number would have been a full compliance.

The case of *Gilpin* v. *Howell*, 5 Barr, 41, does not resemble this. The judge of the district court said, that when the stock was purchased and pledged as collateral security to the defendants (the brokers in that case), their character as agent

ceased, and they became pawnees, pledgees, or bailees. Throughout the opinion of Justice Bell, the same view is taken, that the stock was held in pledge, the defendants being bailees of it. And this court, instead of holding to the rigid rule given to the jury, that the bailees must have been always ready to deliver the same identical shares, held that readiness to deliver the same number of shares would be sufficient.

These views in effect dispose of the second assignment of error, that the judge refused to charge the jury that the plaintiff could not recover unless he had given notice to defendant of his having the stock ready to deliver to him. Notice that he had bought the stock, and to come and take it and pay for it, was all that was necessary in the first instance. Readiness to deliver, under such a notice, could be tested only, as we have said, by an offer to pay and a demand to deliver.

There was no error in permitting the question to be answered contained in the bill of exception. The question called for the personal knowledge of a fact communicated in conversation with the defendant. It was not in the most proper form, and if the answer had given impressions of the witness only, it might have been complained of. But the answer disclosed facts clearly indicating knowledge, to wit: a conversation, probably on the same day, about the purchase of the stock, and the reception of a telegram afterward from the defendant, clearly showing his knowledge of the purchase. A judgment will not be reversed for an immaterial error which does the party no harm.

Judgment affirmed.

KELSEY v. THE NORTHERN LIGHT OIL CO.

(45 New York, 505. Court of Appeals, 1871.)

[1] **Company not responsible for stockholder.** Where stock is purchased from a stockholder, no action will lie against the company for the recovery of money paid for such stock.

Agency a question of fact. Whether a person is acting as the agent of a

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[1] See *Hancock* v. *Hodgson*, 11 M. R. 698.

corporation or of an individual shareholder in a certain transaction for the purchase of stock, is a question of fact for the jury.

[1] **Prospectus—Failure to get the property intended.** In its prospectus an oil company set forth a description of ten tracts of land it proposed to purchase, but only purchased eight. On action brought to recover the price paid for stock, based upon alleged fraud in the representations of the prospectus: *Held*, that it was error for the court to charge that if from the prospectus, the plaintiff had a right to believe the company would acquire the property, and that the company was organized with a view to the ownership of those pieces of property, and it did not obtain them, the plaintiff would be entitled to recover; the facts being that the company purchased other land which it believed of equal value for oil purposes in place of one of the parcels it failed to procure, and retained in its treasury $75,000 cash, the price of the remaining parcel, title to which could not be obtained.

Appeal from the order of the General Term of the Supreme Court, in the First Judicial District, reversing the judgment rendered upon the verdict of a jury in favor of plaintiff.

This action was brought to recover back from the Northern Light Oil Company the sum of $1,000, which the plaintiff alleged he had paid to the company on a subscription by him for one hundred shares of its capital stock, on the ground that such subscription had been procured by false and fraudulent representations made by the company, and that the plaintiff had, upon the discovery by him of the fraud, rescinded the contract, tendered back to the company the stock he had received, and demanded a return of the money he had paid, which demand was not complied with.

The complainant alleged that the company "for the purpose of effecting sales of its capital stock, and inducing the plaintiff and others to subscribe therefor, caused certain prospectuses to be issued and distributed by its officers and agents, and also certain advertisements to be published in the public newspapers of the city of New York, and elsewhere, stating" (to give the substance of the representations alleged to have been false), that the company had, among other pieces of property, an interest in the "Smith-Jones" farm on oil creek, Venango county, Pennsylvania, namely: four ninths of all the oil on three acres of said farm; and an interest in the "Widow Mc-

[1] *Smith* v. *Reese River Co.*, 12 M. R. 415; *Charlotte Bank* v. *Charlotte*, 85 N. C. 433.

Clintock" farm, namely: one fourth of all the oil in the "Hammond" well, which was one of the largest flowing wells on the creek, and averaged more than 200 barrels of oil a day; that the company's property consisted of about 270 acres in fee and leasehold interest, and about 200 acres in fee simple, on which were thirty-eight wells, either then being drilled, or pumping, or flowing; and that from the wells then in operation the product of the company was over 125 barrels of oil per day.

The falsity of the representations was alleged to consist in this: That the company did not own any interest whatever, either in the "Smith-Jones" farm, or in the "Hammond" well, on the "Widow McClintock" farm; that there were not thirty-eight wells in progress or in operation on the property of the company; and the product of oil from the property of the company was much less than 125 barrels per day; and that the falsity of the representations in these respects was known to the officers of the company.

The answer denied the making of any of the representations alleged, and set forth that the plaintiff did not acquire his stock from the company, but from certain other parties. It admitted that the company did not own any interest in the "Smith-Jones" farm, or the "Hammond" well, the titles to those pieces of property having been rejected as invalid.

The plaintiff proved by one Philip A. Lockwood, that he (Lockwood) sold to the plaintiff 100 shares of the stock of the company, and that he acted in making such sale under the employment and as the agent of a firm called Avis, Plummer & Co. He obtained this employment by writing a letter to a firm styled John Boyce & Son, who were named in an advertisement in a newspaper as subscription agents of the company. It appears that there was a connection between John Boyce & Son and Avis, Plumnier & Co., and that the letter thus written by Lockwood came to the hands of Avis, of the latter firm, who called upon Lockwood and employed him. Avis gave to Lockwood several papers relating to the enterprise of forming the Northern Light Oil Company. These were: 1, a paper entitled "mining affairs." 2, a paper entitled "Northern Light Oil Company of New York and Pennsylvania." 3, a paper entitled "Prospectus of the North-

ern Light Oil Company of New York," with a subscription paper attached thereto, which the plaintiff signed.

These papers were exhibited by Lockwood to the plaintiff and the latter signed the subscription paper and paid Lockwood $300, which the latter remitted to Avis, Plummer & Co., and received from them a receipt therefor, signed by Silvanus J. Macy, "trustee." He subsequently received from the plaintiff other sums on account of this stock, which he remitted to Avis, Plummer & Co., or to Macy, directly, and received therefor like receipts, signed by Macy in like manner, and after the requisite number of payments were thus made, he received from Macy a certificate that the plaintiff was entitled to 100 shares of the stock of the company, and delivered it to the plaintiff.

The contents of these papers, so far as they bear upon the points decided, are sufficiently stated in the opinion of the court.

At the conclusion of the trial the defendant's counsel asked the court to charge five propositions, of which the judge charged the fifth as requested and refused to charge the others. Of these, the first, second and fourth were that there was not sufficient evidence to establish certain facts. The third is exactly stated at the beginning of the opinion of the court, and was to the effect that the plaintiff could not recover if Avis was acting for himself and not the company in employing Lockwood.

The defendants excepted to the charge "that the company did receive the avails of that money;" that is, of the money paid by the plaintiff to Lockwood.

The defendants further excepted to so much of the charge "as leaves it to the jury to determine whether the prospectus was a declaration of intention or design to acquire certain property," and in particular to that part of the charge which is in the following words: "You will determine, therefore, in the first place, whether the prospectus was simply a declaration of intention or design to accomplish these results if they could. If upon this paper the plaintiff had the right to believe that it was reasonably certain that the company would acquire the property, and that the company was organized with a view to ownership of these pieces of property, then if

they did not obtain it he would be entitled to recover." The jury found a verdict for the plaintiff.

WILLIAM HENRY ARNOUX, for the appellant.

JAMES C. CARTER, for the respondent.

GROVER, J.

The court erred in refusing to charge the jury as requested by defendant's counsel, that the plaintiff could not recover if the jury believed that Mr. Avis, in employing Mr. Lockwood to dispose of stock in the company, or to procure subscriptions therefor, was acting, not as the agent of the company, but for the purpose of disposing of stock in the company which he, Mr. Avis, had agreed to take, at or about the time of the formation of the company. Upon this question the testimony was conflicting. There was no question but that Lockwood, who procured the subscription of the plaintiff for stock, was employed for this purpose by Avis, and derived all his authority for this purpose from him. On the part of the plaintiff evidence was given tending to show that Avis was employed by the company to procure subscriptions to and effect sales of stock belonging to the company, for its benefit, as its agent. On the part of the defendant, evidence was given tending to prove that the projectors of the company had severally agreed to take portions of the stock, in the aggregate amounting to the entire stock of the company; that Avis was one of these projectors, and that he agreed to take five thousand shares at ten dollars each; that he was never in any way employed by the company, as its agent or otherwise, to procure subscriptions to or otherwise to dispose of its stock; that he employed Lockwood on his own account, to dispose of stock he had agreed to take for himself or for his firm. There was no such preponderance in the testimony as to authorize the judge to take the question from the jury, or to direct a verdict for the plaintiff. The question should, therefore, have been submitted to the jury. It is obvious that the plaintiff could not maintain an action against the company for the recovery of the money paid for the stock, if Avis was his vendor upon the ground claimed, viz., that he has rescinded the contract on the ground of misrepresentation of the property owned by the

company. This error would require an affirmance of the order appealed from; but as the case presents another question which may affect the rights and liabilities of the defendant, it is proper that the court should consider and pass upon that also. The defendant's counsel excepted to the following portion of the charge: "You will determine therefore, in the first place, gentlemen, whether the prospectus was simply a declaration of intention, or design to accomplish these results if they could. If upon this paper the plaintiff had the right to believe that it was reasonably certain that the company would acquire the property, and that the company was organized with a view to the ownership of these pieces of property, then, if they did not obtain it, he would be entitled to recover." The verdict for the plaintiff may have been rendered solely upon this portion of the charge. To determine its correctness, we must not only examine the prospectus itself, but also the extrinsic facts in reference to which it was prepared, and, so far as these facts were known to the parties, in the light of which it must be construed, together with the extent of the failure of the company to obtain title to all the property specified in the prospectus. It may be remarked that there was no conflict in the testimony as to any fact bearing upon the construction, except as to whether the defendant was incorporated before or after the plaintiff subscribed for the stock. The paper in question was headed, "Prospectus of the Northern Light Oil Company of New York; lands of the company all on Oil creek, Venango county, Pennsylvania," and proceeds as follows: "George A. Boyce, Avis, Plummer & Co., of New York, and associates, propose to organize a company under the general mining laws of the State of New York, with a capital of $1,000,000 consisting of 100,000 shares of the par value of ten dollars, to purchase and work the following petroleum oil lands and interests." Then follows a specific location and description of ten different pieces of property, each containing either a quantity of land or an interest in some existing oil well, or both. Then follows a recapitulation, in which the statement is as follows: The company's property now comprises about 270 acres in fee and leasehold interests, and about 200 acres in fee simple, adding a statement of the number of wells thereon in process of drilling, and those completed, and either pumping or flowing wells, with

the quantity of oil obtained therefrom, and the price of the oil and the dividends that could be paid upon the stock of the company, and then proceeds as follows: Whereas, George A. Boyce and Avis, Plummer & Co., of 63 Pearl street, New York city, and their associates, propose to organize a company under the general mining and manufacturing laws of the State of New York, to be known as the Northern Light Oil Company, with a capital of $1,000,000, consisting of 100,000 shares at the par value of ten dollars per share, and whereas, said company intended to purchase certain oil and mineral lands situated in the townships of Alleghany and Cornplanter, county of Venango, and State of Pennsylvania, and issue in payment therefor, 100,000 shares of the capital stock of said company, now therefore, we, the undersigned, hereby subscribe, each for himself, the amount or number of shares set opposite our respective names, toward purchasing the annexed schedules of property at $1,000,000. And it is hereby agreed and understood, that all moneys so subscribed shall be paid to a party, or trustees, elected by the subscribers, after the whole amount of stock shall have been taken. Then follows a statement specifying the installments for payment of the stock subscribed for, and the times when payable.

This was the prospectus signed by the plaintiff in reference to which the charge excepted to was made. The statement in the recapitulation of what the property of the company consisted, must be construed in reference to the preceding and succeeding clauses of the paper so construed. No one could understand that the company, if then incorporated, actually had the title to any of the real estate specified in the prospectus. The object of the subscription, as stated, was to enable the company to purchase the property specified for $1,000,000. There was no assurance that the company had already acquired title, but only of an intention to purchase and operate it for oil purposes. There was no question made as to the entire good faith of the defendant. The company was incorporated and proceeded to acquire title to the property, and did obtain title to eight parcels of the property. It failed to obtain title to two of the parcels, for the reason that they were so situated that a satisfactory title thereto could not be obtained. The company purchased other land which it believed of

equal value for oil purposes, in the place of one of the parcels it failed to procure. It retained in its treasury $75,000 in cash, which was the price of the remaining parcel, title to which could not be obtained. To hold that after all this had been done by the company in good faith, the plaintiff had the right to rescind his contract for taking stock in the company and recover from it the money paid therefor, in case a jury should find he had the right to believe that it was reasonably certain that the company would acquire each and every parcel of the property, and that the company was organized with a view to ownership of these pieces of property, would operate as a great hardship upon the other stockholders. The money of all has been, by the company, invested in real estate, pursuant to the intention upon which the company was organized. Doubtless all believed that the company would be able to purchase all the property specified in the prospectus, but each must have known that this was more or less contingent, depending upon the willingness of the then owners to sell, and their ability to give a good title. As to two of the parcels, the case shows that a good title could not be obtained by the company. This risk each stockholder assumed for himself to the extent of his interest in the company. The corporation, when organized, became the owner of all money that had been paid for its stock, and it had the right in good faith to proceed in the execution of the objects for which it was created. This it did by appropriating, so far as it appears, in good faith, its funds to the purchase of the property which it was designed it should acquire, so far as such lands could be purchased, and a satisfactory title obtained. The unforeseen obstacle which prevented the purchase of two of the intended parcels, was a misfortune which should be shared by all the stockholders, and if a loss was thereby sustained, such loss should be shared by all in common. The effect of the charge was to relieve the plaintiff entirely, at the expense of some or of all the others. The error of this portion of the charge was not obviated by the further instruction that they must further find that it was material to the plaintiff that the company should own every parcel. If this was material to the plaintiff, it was equally so to the other stockholders. Had the plaintiff commenced an action for a distribution of the assets of the company before

any purchase had been made, upon the ground that it had become impossible to carry its objects into effect, the case would have been different. Then equal justice could have been done to all. Now, none can be relieved, except at the expense of others equally innocent of intentional wrong as the plaintiff. *Gerhard* v. *Bates*, 75 Eng. Com. Law, 475, *Biddle* v. *Levy*, 2 Stark. 202, *Seaman* v. *Low*, 4 Bos. 337, cited by the learned judge below in his dissenting opinion, were all cases of fraud, and have no application to the facts of this case. I have not referred to the other papers shown to the plaintiff to induce him to subscribe, for the reason that they have no bearing upon the question presented by the exception to the charge. The order of the General Term reversing the judgment for plaintiff, and directing a new trial, must be affirmed, and judgment final given for the defendant, with costs upon the stipulation.

All concurring except PECKHAM, J., not voting.

Judgment reversed.

PARROTT ET AL. v. BYERS ET AL.

(40 California, 614. Supreme Court, 1871.)

Pleading—Averment that defendants are trustees. An averment that the defendants are "*the* duly elected trustees of said company," is equivalent to an averment that they are the only trustees.

[1] **Suit by stockholders in lieu of corporation.** In an action by the stockholders of a corporation against the trustees, praying for an accounting and an injunction to stay waste, the answer denied the trust and also the existence of the corporation itself: *Held*, that this denial dispensed with the necessity of averring in the complaint that the trustees had been requested to institute an action in the name of the corporation for the redress of the grievances complained of, inasmuch as it was obvious from the answer that such a demand would have been refused; nor is it a defense that it was in the power of the plaintiffs to elect a new board of trustees, and thus cause an action to be brought in the name of the corporation.

Misnomer of immaterial party. In an action against the trustees of a corporation, in which the corporation is made a party defendant under the name Washington *Gold* Q. M. Co. instead of Washington Q. M. Co., if

[1] *Converse* v. *Dimock*, 22 Fed. 573.

it appears that the corporation was a necessary party only upon a branch of the case wherein no relief was granted, the defendants are not prejudiced by the misnomer.

[1]**Trustees can not deny the charter.** Parties who sign a certificate of incorporation and accept the office of trustees thereunder, can not, in an action against them for waste of the corporate property, etc., deny the validity of the act of incorporation.

Transfer of stock not registered. A transfer of stock which has not been entered on the books of the company, as required by statute, is nevertheless valid for the purpose of enabling the assignee to maintain an action against fraudulent trustees who are wasting the corporate property and converting it to their own use.

Injunction—Stockholders against trustees—Sufficient proof of title. A board of trustees of a mining corporation denying the corporate ownership, and asserting title in their own right, and working the lode for their own benefit, may be enjoined at the suit of one or more stockholders and in such case evidence of prior possession in the corporation and the entry by defendants as the trustees of such corporation, will support a finding in favor of the plaintiff, as to the ownership.

Waiver of objections to deposition. Although an exhibit to a deposition is objected to when produced by the witness, and the objection is noted in the deposition, yet, if the objection is not renewed at the trial, it will not be considered on appeal.

Appeal from the District Court of the Second District, County of Plumas.

The case is stated in the opinion.

VANCLIEF & GEAR, for appellants.

HAYMOND & STRATTON, for respondents.

CROCKETT, J., delivered the opinion of the court, TEMPLE, J., WALLACE, J., and RHODES, C. J., concurring.

The plaintiffs claim that the Washington Quartz Mining Company is a corporation organized under the laws of this State for mining purposes, and is the owner of a certain lode or vein of gold-bearing quartz, which is described in the complaint; that the capital stock of said corporation is divided into one hundred and eighty-one shares, of which the plaintiffs own one hundred and fifty-seven shares and the defendants twenty-four shares; that the defendants "are the duly elected

[1] *McCune M. Co.* v. *Adams*, 10 Pac. 468.

trustees of said company," and accepted the trust and entered upon the discharge of their duties as such trustees, and, in their capacity of trustees, took possession of said mine; but that recently the defendants have repudiated the trust and claim to be the owners, in their own right, of said mine, and assert title thereto, adversely to said corporation, and are working said mine for their own profit and advantage, and in hostility to the rights of said company; that they have taken from said mine a large amount of gold, for which they refuse to account; that they have neglected to keep any books of account, or any record of their proceedings, and are unable to respond to any judgment at law which might be recovered against them for these injuries. The prayer is for an accounting, and for a perpetual injunction restraining the further committing of these wrongs. The answer denies the existence of the corporation, or that it owns any lode or vein of quartz, or that the defendants are, or ever were, the trustees of such corporation, or that, as such, they took possession of the mine described in the complaint; and they aver, affirmatively, that for more than five years last past they have been and are the owners in possession of a certain mine in that vicinity, claiming and holding the same adversely to all persons whomsoever. The answer also sets up the Statute of Limitations of two years, and avers that if the corporation ever owned the mine it had abandoned it before the commencement of the action. Judgment was rendered for the plaintiffs, and the defendants have appealed.

The first point made by the defendants is that the complaint is fatally defective in a matter of substance, and does not support the judgment in this, to-wit: That it is not averred in the complaint that the defendants constitute the whole, or even a majority of the trustees of the corporation, and it is not alleged that the trustees were requested to institute an action in the name of the corporation for the redress of the grievances complained of. It is claimed, on the authority of *Cogswell* v. *Bull*, 39 Cal. 320, that without these averments this action will not lie in the name of the stockholders. The answer to this objection is: *First* That the complaint avers that the defendants are "*the* duly elected trustees of said company;" which, upon every

rule of grammatical construction, is precisely equivalent to an averment that they are the only trustees. If the word "the" had been omitted from the sentence, the criticism of the complaint in this respect would have been well founded. But as it stands, the sense would have been precisely the same if the averment had been that they were "the trustees of said company, duly elected," which necessarily imports that they were the only trustees. The only office of the word "the" in this connection is thus to qualify the meaning; for, otherwise, the sense would be the same whether this word be omitted or included. *Second.* The complaint avers that the defendants have repudiated the trust and converted the trust fund to their own use, whilst the answer not only denies the trust but also the existence of the corporation itself. It is a familiar rule that where the relations between the parties are such that a demand and refusal is a condition precedent to the right of the plaintiff to maintain the action, a denial in the answer of the relation on which the action is founded will dispense with the necessity of an averment in the complaint of a previous demand and refusal. In an action by a landlord against his tenant, or by a vendor against his vendee for the possession, or by a *cestui que trust* against the trustees to enforce the trust, if a demand and refusal were otherwise necessary, a denial in the answer that the alleged relation exists between the parties will dispense with the necessity of averring or proving a prior demand and refusal. The law does not require a useless act to be performed; and when it is plain from the answer that if a demand had been made it would have been refused, it does not lie in the mouth of the defendant to object that no demand was made. In this case, a demand made upon the defendants as trustees to institute an action against themselves, in the name of the corporation, for the spoliation of the corporate property, could have subserved no useful purpose. It is obvious from the answer that such a demand would have been refused, inasmuch as the existence of the corporation itself is denied. It would have been an idle farce to have made such a demand upon these defendants, in view of the defense which is set up in the answer. But it is claimed that the proofs show that there were two other trustees in addition to the defendant, and that three would have formed a quorum,

of which two would have been a majority, and that it is not impossible, but that in this method the plaintiffs might have procured an action to be brought in the name of the corporation if they had requested it. But if by chance such an action had been commenced under these circumstances, it would have been under the control and management of these defendants, who constituted a majority of the trustees, and who might at any time have caused it to be dismissed. If allowed to proceed, the rights of the stockholders would have but little protection in an action in the name of the corporation against the majority of the trustees, who repudiate the trust, deny the existence of the corporation, and are charged with a gross abuse of the trust property.

The next point is that the plaintiffs might, at any time, have elected a new board of trustees, and in this way have caused an appropriate action to be brought in the name of the corporation. But this suggestion is entitled to no consideration, coming, as it does, from defendants who deny the existence of the corporation, and who are holding adversely to it. The question before us relates to the rights of the plaintiffs as they stood at the time of the commencement of the action; and it is no defense for the defendants that it was in the power of the plaintiffs, if they had chosen to do so, to elect a new board of trustees.

In the original complaint, the "Washington *Gold* Quartz Mining Company" was named as a party defendant, and the summons was issued against the corporation by that name, and was returned as served. But at the trial the court permitted the complaint to be amended by striking out the word "*Gold*" from the name of the corporation; and, thereupon, the defendants objected to proceeding further in the trial, on the ground that service on the "Washington *Gold* Quartz Mining Company," was not service on the Washington Quartz Mining Company, and that the action could not proceed until the last named company either appeared or was brought in by proper service. But the court ordered the trial to proceed, and the defendants excepted. We might presume, in support of the judgment, that the court was satisfied that the interpolation of the word "*Gold*" into the corporate name was only a clerical error or the result of inadvertence, and that service was, in

fact, duly made upon the proper corporation, though by a wrong name. But it is unnecessary to express a decided opinion on this point, inasmuch as the corporation was a necessary party in respect only to that branch of the case relating to the accounting; and as the relief granted was limited to an injunction restraining further waste or the assertion of a hostile title by the defendants, if the court erred in ordering the trial to proceed without due service on the corporation, it was an error which did the defendants no harm. If an accounting had been ordered, the corporation would have been a necessary party, inasmuch as the sum found to be due could be paid only to the corporation and not to the stockholders. But when the purpose of the action is only to stay waste and to preserve the corporate property, no useful end could be subserved by making the corporation a party, and the defendants could not have been prejudiced by a failure to do so.

The defendants also assail the judgment on the ground that the certificate of incorporation is void because it fails to specify the town or county in which the principal business of the corporation is to be carried on. But if the certificate be liable to this objection, the defendants are estopped from urging it. They not only signed the certificate, but accepted the office of trustees, and in that capacity acquired the possession of the corporate property. Estoppels *in pais* would be of little value if the unfaithful trustees of a corporation, who are fraudulently wasting the corporate property and appropriating it to their own use, could shield themselves behind a technical defect in the act of incorporation. On this point see *Rockville Turnpike* v. *Van Ness*, 2 Cranch C. C. 449.

The next error assigned is, that there was no competent evidence that either of the plaintiffs, at the time of the commencement of the action, was a stockholder of the corporation. It was proved that one Card was the holder of a certificate issued to him for two shares of the capital stock, and that he assigned this certificate to the plaintiff, Parrott, but there was no proof that the transfer had been entered on the books of the corporation; and it is claimed that under the Corporation Act of 1850, Parrott could not become a stockholder until the transfer is entered on the books. The case of *Weston* v. *Bear River Co.*, 5 Cal. 186, is cited in support of this proposition.

The point decided in that case was, that a transfer of the certificate of stock, without an entry on the books, was void as against a subsequent attaching creditor of the assignor. In the case between the same parties (6 Cal. 425), it was held that the transfer was valid as against a subsequent assignee, who took with notice of the prior assignment.

The principle decided in these cases was affirmed in *Naglee* v. *Pacific Wharf Co.*, 20 Cal. 529, and *Mead* v. *Elmore*, decided at the July term, 1868, but not reported. In the latter case, in commenting on those before cited, we said: "It was held in those cases that transfers of stock which have not been entered on the books of the company, as provided in the statute, are nevertheless valid as against all the world, except subsequent purchasers in good faith without notice."

In the case at bar the question as to the validity of the assignment, and its effect, does not arise as between a subsequent and a prior assignee, nor as between the assignee and the corporation, but as between the assignee and unfaithful trustees, who have no equities to be protected. It is unnecessary for us to decide what would be the effect of the assignment if the contest were between Parrott and the corporation as to the rights which he acquired by the transfer, as against the corporation. But it is clear that in requiring transfers of stock to be entered upon the books it was not the purpose of the statute to declare such transfer void at law and in equity, as against fraudulent trustees who are wasting the corporate property and converting it to their own use.

I am therefore of opinion that the transfer to Parrott invested him with such rights as entitle him to maintain this action. This view of the case renders it unnecessary to inquire whether the proof shows the other plaintiffs to have been stockholders, as it is sufficient to maintain the action if either one of them was a stockholder.

But Exhibit "B" certainly tended to show that the other plaintiffs were also stockholders, and, though this document was objected to when produced by the witness English, and the objection noted in the deposition, I fail to discover anything in the record to show that the objection was renewed at the trial, or that the court was requested to decide or did decide upon the competency of the proof. Objections of this kind can not be raised for the first time in this court.

There was evidence tending to show that the defendants, Byers and Nave, were and are trustees of the corporation, and the judgment can not be disturbed on the ground of a failure of proof on this point.

The last error assigned is that the court erred in finding the issues of title in favor of the plaintiffs. On this point it is sufficient to say that there was evidence tending to show a prior possession by the corporation of the mining ground in contest, and that the defendants entered into the occupation of it as trustees of the corporation. This was clearly sufficient proof of title to support the judgment.

Judgment affirmed.

CHILD ET AL. v. HUGG.

(41 California, 519. Supreme Court, 1871.)

Conflict of evidence. If the testimony is conflicting, the judgment will not be disturbed on the ground that it is not warranted by the evidence.

[1] **Ratification of a sale made by a pledgee.** If a sale of mining stock, pledged as security for money, is made without notifying the pledgor to make his margin good, and without sufficient notice of time and place, still, if the pledgor knew of the time and place of sale, and made no objection, and after the sale approved of it, and promised to pay a balance claimed by the pledgee, he by these acts ratifies the sale.

Appeal from the District Court of the Twelfth Judicial District, City and County of San Francisco.

This action was brought to recover $3,551.39, for stock purchased for defendant, and commissions and advances, and cash loaned to him by plaintiffs, as brokers. The defendant set up in his answer, by way of counter claim, that for the payment of the indebtedness he pledged as security one hundred shares of the stock of the Bullion Mining Company, and that the plaintiffs sold the same without his authority or permission, and that after the sale the shares were worth $13,000. The testimony showed that the plaintiffs had the stock in pledge, and sold the same in the Board of Brokers for $1,152.50,

[1] *Kent* v. *Quicksilver Co.*, 4 M. R. 48; *Breed* v. *First Nat. Bank*, 1 M. R. 467.

on the 14th or 15th of September, 1866. The testimony further tended to show that before the suit was brought the Bullion mining stock sold as high as $160 per share. The court below gave judgment for the plaintiffs for the sum claimed, and the defendant appealed.

The other facts are stated in the opinion.

HENRY E. HIGHTON, for appellant.

The sale was invalid, because the appellant was not notified to make his margin good, nor of time or place of sale: *Markham* v. *Jaudon*, 41 N. Y. (2 Hand.) 239.

J. W. WINANS, for respondents.

The question of notice does not arise. The defendant ratified the sale after it was made.

By the Court, TEMPLE, J.

This appeal presents only a case of conflicting evidence. The testimony of the plaintiffs is sufficiently positive that the account presented to the defendant was acceded to by him, and the finding of the court supports that view. It may be admitted that defendant was entitled to notice to make his margin good before the stock which was pledged could be sold; also, that the notice of the time and place of sale was insufficient. Still, if the evidence of plaintiffs is to be taken as true, defendant did know in advance of the contemplated sale, and of the time and place, and made no objection, and that after the sale he was presented an account, in which he was credited the amount received at the sale; that, knowing all the facts, he admitted the correctness of the account, and even approved of the sale, and repeatedly afterward promised to pay the balance claimed to be due; that he never, on any occasion prior to the bringing of the suit, objected to the correctness of the account, or to the sale, on account of want of notice, or for any other reason. If this testimony be true, it is sufficient to sustain the finding that the sale had been ratified by the de-

fendant, and we do not feel at liberty to disturb the finding of the court on that point.

For the same reason, it is not necessary to consider the point made that a sale in the Board of Brokers, where the general public are not at liberty to bid, is not a sale at public auction, such as a pledgee of stock is authorized to make upon default being made by the pledgor.

Judgment and order affirmed.

ATKINS v. GAMBLE.

(42 California, 86. Supreme Court, 1871.)

[1] **Identity of shares—Sale of stocks by bailee.** Where a bailee of mining stock is at all times able, ready and willing to transfer to the bailor the same number of shares of similar stock, of the same company, and of the same value, the sale or conversion of the identical shares pledged only constitutes a technical breach of trust, and presents a case of *damnum absque injuria*.

Bailor's right to ratify. If the bailee of personal property sell it, in violation of his authority, the owner may ordinarily ratify the transaction and demand the proceeds of the sale.

General rule as to remedy of bailor for conversion. The owner of personal property which has been wrongfully converted, is ordinarily entitled to recover his specific property, or its value, and cannot be compelled to accept other property of the same kind and equal in value in lieu of that which was converted.

Exception to the rule where stock is concerned. Shares of stock in a corporation stand upon a different footing from other personal property, as regards the right to the recovery of the specific property, because they are mere evidences of interest in the business of the corporation, and, if all the shares are of equal value, there can be no reason for preferring one share to another.

Appeal from the District Court of the Fourth Judicial District, City and County of San Francisco.

The facts are stated in the opinion of the court.

S. M. WILSON and A. P. CRITTENDEN, for appellant.

E. CASSERLY and W. H. L. BARNES, for appellee.

[1] *Wynkoop* v. *Seal*, 13 M. R. 493.

By the Court, CROCKETT, J.

The legal propositions involved in this case are of great practical importance, and, in arriving at a satisfactory solution of them, we have been very much aided by the able and exhaustive briefs of the respective counsel.

In 1863 the Antelope mine, in Esmeralda district, was owned by an incorporated company, established under the laws of the State, and having its principal place of business at San Francisco. The defendant was president of the company, and the plaintiff was superintendent of the mine. The interests of the respective stockholders in the company were represented by certificates of stock, in the usual form, and the plaintiff was the owner of thirty-three and one-third shares, represented by six certificates for five shares each, and one certificate for three and one-third shares. He was also the owner of certain shares, represented by similar certificates, in the Real del Monte Company, another mining corporation. In order to meet accruing assessments on these stocks, the plaintiff borrowed from defendant a certain sum of money, which was to be refunded, with an agreed rate of interest, and hypothecated the stocks with the defendant as collateral security for the sum advanced and the accruing interest. The certificates were indorsed by the plaintiff and delivered to the defendant. The plaintiff claims that it was agreed that the defendant should sell, for the plaintiff's account, the Real del Monte stock, whenever he could obtain therefor not less than forty dollars per share, and the Antelope stock, when he could obtain for it not less than five hundered dollars per share. Ultimately the Real del Monte stock was sold by the defendant at the price limited, and he received the money therefor, of which fact the plaintiff was duly notified, and no complaint is made in respect to this transaction. The money thus received was not only of sufficient amount to refund the advances made to the plaintiff, with the interest then due thereon, but there remained in the hands of the defendant a considerable excess to the credit of the plaintiff. During all this time the defendant was the owner, in his own right, of a number of shares of stock of the Antelope company exceeding in amount the thirty-three and one-third shares of the plaintiff

Whilst the plaintiff's certificates for the Antelope stock so remained in the hands of the defendant, the latter sold to Edward Martin ten shares of the stock of that company, for four thousand dollars, being at the rate of four hundred dollars per share, and delivered to Martin, in fulfillment of the contract of sale, ten shares of the plaintiff's stock. The defendant claims that in the sale to Martin he sold his own stock, and not the plaintiff's; and that he delivered the plaintiff's certificates for the ten shares, instead of his own, only because, being the president of the company, he feared it would depreciate the value of the stock in the market if it should become known that he was selling his own stock; and that he used the plaintiff's certificates under the belief that no damage could result to the plaintiff, inasmuch as he (the defendant) had and continued to have more stock of the same company than was necessary to replace it, which he held for the plaintiff's use in lieu of that delivered to Martin. It further appears that the defendant caused fifteen shares of the plaintiff's stock to be transferred on the books of the company to Donohoe, Ralston & Co., to whom new certificates were issued, and who immediately indorsed the new certificates and returned them to the defendant. It also appears that the defendant on one occasion loaned to Perry, a stockbroker, five shares of plaintiff's stock, and within a few days thereafter Perry returned to the defendant another certificate for the same amount of stock. The defendant further claims that after all these transactions he and the plaintiff had a full and final settlement of all matters connected with these stocks; and that after being fully informed of all that the defendant had done in the premises the plaintiff ratified his acts and the parties exchanged receipts.

The complaint, after averring the ownership of the plaintiff of the Antelope stock, and describing the several certificates, alleges that the plaintiff duly indorsed the certificates, so that the title might pass by delivery, and delivered them to the defendant, to hold the same in trust and as agent for the plaintiff, and if sold, to be sold for the account and benefit of the plaintiff, and the proceeds to be paid to the plaintiff; that the defendant afterward sold ten of said shares for the market price of four hundred dollars, in gold coin, per share, and received the money therefor, to and for the use of the plaint-

iff; that he subsequently sold fifteen of the remaining shares for the then market price of three hundred and forty-five dollars, in gold coin, per share, and received the said sum to and for the use of the plaintiff, that he afterward sold five of the remaining shares at the then market price of two hundred dollars, in gold coin, per share, and received said sum to and for the use of the plaintiff; that the defendant willfully and fraudulently failed and neglected to inform the plaintiff of these sales, and fraudulently concealed said transactions from the plaintiff, and thereby caused the plaintiff to believe that the stock had not been sold; that being thereby deceived in respect to the facts, the plaintiff afterward paid to the defendant certain sums as and for so much money advanced by the defendant to pay assessments on said stock; whereas, in fact, before the assessments were levied, the defendant had sold said stocks, and had received the proceeds to and for the plaintiff's use; that during all this time the plaintiff was absent from San Francisco, and was ignorant of the dealings of the defendant in said stocks; that ultimately the plaintiff came to San Francisco, and called upon the defendant for a settlement; that the defendant then returned the certificate for three and one-third shares, and informed the plaintiff that he could get the residue of his stock at the office of the company, and represented and stated that there had been some manipulation going on, which had made it necessary for him to use the plaintiff's name, but never informed the plaintiff that he had sold the plaintiff's stock, and falsely and fraudulently, and with intent to cheat the plaintiff, induced him to believe, and he did believe, that the plaintiff's stock was at the office of the company, ready to be delivered to him; that thereupon, at defendant's request, the plaintiff took from the company a certificate for thirty shares belonging to defendant, and supposing the same to belong to the plaintiff, being induced and fraudulently persuaded by the defendant to receive the same; and was also compelled to pay to the company seven hundred and fifty-five dollars, as assessment on said thirty shares, before it was delivered to him, which he would not have done if he had known that it was the defendant's stock and not his own; that the defendant had and received the said sums of money as the agent of the plaintiff, and to and for his use; that whilst the

plaintiff was ignorant of these facts, and misled and deceived by the statements and concealments of the defendant, the defendant procured from the plaintiff a receipt in full of all demands; that the receipt was obtained by fraud, undue influence and willful misrepresentation, and with the intent to secure to the defendant the money received for the thirty shares, etc.; that, on discovering the fraud, he demanded payment of the defendant, which was refused. The prayer of the complaint is for a judgment for the several sums received by the defendant, with interest.

The answer admits that the plaintiff owned the thirty-three and one-third shares and delivered the certificates therefor, properly indorsed, to the defendant; but avers that they were delivered solely as collateral security for the advances made by the defendant to the plaintiff, and not upon any trust whatsoever; that the defendant was then and thereafter a large dealer in the stock of said company, having many shares standing in his own name, and holding many certificates for both large and small amounts, issued to other persons, and properly indorsed, so as to pass by delivery; that desiring to make sale of a portion of his own stock in said company, he ordered his broker to sell the same; and in performing the contract of sale he delivered to the purchaser, amongst other certificates, two of those of the plaintiff for five shares each; that he delivered them as his own certificates, and not as those of the plaintiff; that the contract of sale was for his own account and for his own stocks, and not for the plaintiff, or on his account; that he had then, and has ever since had, other certificates of the same kind, and of the same amount, which he held for the plaintiff, and has at all times been ready to deliver. The answer denies the sale of the fifteen shares and of the five shares, or that the defendant ever received any sum of money therefor; and denies all the fraudulent representations and concealments charged in the complaint, or that the plaintiff was ignorant of the actual facts as they existed. It then avers that, after being fully informed of all the facts, the plaintiff accepted a certificate for the thirty shares, and gave to the defendant a receipt acknowledging payment in full of all demands to that date.

The findings are to the effect:

First. That the plaintiff owned the thirty-three and one-third shares, for which he held certificates as above stated, which were so numbered as to render them easily capable of identification; and that he also owned one hundred and twelve shares of Real del Monte stock.

Second. That in October, 1862, he made an arrangement with the defendant by which the defendant agreed to receive, and did receive, the said stocks for sale under the plaintiff's instructions; and, until the same should be sold, to advance and pay for the plaintiff the assessments levied and to be levied on said stocks, holding the stocks as security for said advances and interest thereon.

Third. That up to February 28, 1863, the defendant had in this manner advanced for the plaintiff about one thousand dollars, on which day the defendant sold the Real del Monte stock for four thousand four hundred and eighty dollars, which he received; out of which he paid himself his advances and interest; and by agreement with the plaintiff, held the balance of three thousand three hundred and seventy-eight dollars and ninety-three cents for the account of the plaintiff and as a fund from which to pay any assessments to be thereafter levied on the Antelope stock; and the said fund was more than sufficient for that purpose.

Fourth. That on the 7th of March, 1863, the defendant wrongfully sold ten shares of the plaintiff's Antelope stock for four thousand dollars in gold coin, which he received and appropriated to his own use; that on the 29th of April, 1863, without the knowledge or authority of the plaintiff, the defendant wrongfully disposed of, to his own use, fifteen other shares of said stock, which was then of the market value of three hundred and forty-five dollars, in gold coin, per share; that on the 19th of February, 1864, without the knowledge or authority of the plaintiff, the defendant wrongfully disposed of, to his own use, five other shares of said stock, which was then of the market value of two hundred dollars per share, in gold coin.

Fifth. That the plaintiff never made any ratification, confirmation or settlement of said transactions, or any of them; that in March, 1864, the plaintiff required of the defendant that he should return to him his thirty-three and one-third

shares, and account with him for the moneys in defendant's hands; that the defendant did not account with the plaintiff for said moneys, or return said stock; but in lieu thereof returned to him only three and one-third shares, and delivered to him an order on the secretary of the company to transfer on the books of the company to the plaintiff thirty shares of the defendant's stock, on the payment by the plaintiff of seven hundred and fifty dollars in gold coin, being the amount of an assessment alleged by the defendant to be due thereon; and the defendant at the same time handed to the plaintiff three hundred and seventy-one dollars and thirty-nine cents in cash, as and for the balance of the plaintiff's moneys in his hands, alleging that all the rest of the plaintiff's money in the defendant's hands, being three thousand and seven dollars and fifty-four cents, had been applied by the defendant in payment of assessments on said thirty shares of the plaintiff's stock; that of the said sum, three thousand dollars had not in fact been so applied, and the assessments referred to by the defendant as those on which he had applied the three thousand dollars, were all levied after the periods when he had wrongfully disposed of said thirty shares; that at the defendant's request, receipts in full of all demands, written out by the defendant, were then and there exchanged between the parties; that the plaintiff paid to the company the seven hundred and fifty dollars in gold coin, and had the thirty shares transferred to him on the company's books; that the defendant did not then, or at any time, disclose to the plaintiff the facts, or any of them, specified in the fourth finding, but withheld the same from the plaintiff; and the plaintiff received the thirty shares, paid the seven hundred and fifty dollars, and exchanged receipts with the defendant, in ignorance of said facts, and by reason of such ignorance; that said facts were not discovered by the plaintiff until about the middle or latter part of June, 1864, when he immediately returned to the defendant the certificate for the thirty shares and demanded payment of the moneys sued for, which payment was refused, and has never been made.

Sixth. That during all the period covered by these transactions, the defendant had more than seventy shares of the Antelope stock standing in his name on the books of the company, and owned by him.

Seventh. That by the custom of brokers in San Francisco, one share of stock is considered of no more value than another share of stock in the same corporation, and that stock brokers frequently exchange certificates for the same number of shares in the same corporation; but neither the plaintiff nor defendant was a member of the Board of Brokers, nor were said transactions, or any of them, had with reference to any custom of said board.

As conclusions of law, the court finds: 1st. That from October, 1862, to February 28, 1863, the defendant held the plaintiff's stocks as pledged, and as security for the advances made by the defendant to pay assessments on the stocks; that the bailment by way of pledge terminated on said twenty-eighth of February, after which the defendant sold the Antelope stock as the plaintiff's bailee and agent for the sale thereof, under the plaintiff's orders; 2d. That the custom of the Board of Brokers is irrelevant and immaterial to this case; 3d. That the dealings of the defendant with, and the disposition made by him of the several parcels of said stock, amounting to thirty shares, were wrongful, and were not, any of them, authorized, ratified, or confirmed, nor was any settlement thereof made by the plaintiff, and the plaintiff is entitled to recover the four thousand dollars, proceeds of the sale of ten shares; five thousand one hundred and seventy-five dollars, the value of the fifteen shares; one thousand dollars, the value of the five shares; three thousand three hundred and seventy-eight dollars and ninety-three cents, the balance of plaintiff's money remaining in defendant's hands (less the three hundred and seventy-one dollars and thirty-nine cents paid to the plaintiff); and the seven hundred and fifty dollars paid by the plaintiff to the company; the whole sum for which judgment is ordered being thirteen thousand nine hundred and thirty-two dollars and fifty-four cents, with interest from July 1, 1864, of which sum seven thousand dollars and the interest thereof, is to be paid in gold coin. Judgment was entered for the plaintiff in accordance with these findings, and the defendant moved for a new trial, on the ground, amongst others, that the evidence was insufficient to support the findings, and the statement in support of the motion contains the proper specifications in that respect. The motion for a new trial was denied, and defendant has appealed.

We have been thus minute in stating the pleadings and findings, in order to avoid any misapprehension as to the precise points to be decided on the appeal.

In respect to many of the controlling facts of the case, there is little or no contrariety in the evidence. As to the ten shares of Antelope stock, the only testimony concerning the sale of them by the defendant was to the effect that the defendant, being the owner in his own right of a large amount of the stock of that company, ordered his broker to sell a portion of it; that the broker contracted to sell twenty or more shares to Edward Martin, and in performing the contract of sale the defendant, who was president of the company, delivered to Martin ten shares of the plaintiff's stock; that in so dealing with these shares the defendant delivered them as his own, and not as the property of the plaintiff; that the sale to Martin was intended by the defendant to be of his own stocks, and not the plaintiff's; and that the defendant, during the whole time, held in his own name more than enough of the stock of the company to replace the ten shares of the plaintiff.

The argument of the counsel for the plaintiff on this branch of the case is, that inasmuch as the defendant sold these ten shares without the authority of the plaintiff, and against his orders, it was a wrongful conversion of the stock by the defendant to his own use; that it was optional with the plaintiff whether he would repudiate the sale and hold the defendant for the market value of the stock, or, waiving the wrongful conversion, ratify the sale and demand the proceeds.

There can be no doubt as to the general proposition that, if the bailee of personal property sell it in violation of his authority, the owner may ratify the transaction and demand the proceeds of the sale. If A intrust to B a steamboat for sale at a limited price, and if B, in violation of his duty, sell it for a less price, A may acquiesce in the sale and demand the proceeds. This proposition needs no argument or citation of authorities to sustain it. It would not be at the option of the bailee whether he would account for the proceeds or deliver another steamboat of equal value; nor would it be any defense for him to say that he, at all times, had and held another steamboat of equal value, which he was ready to deliver in place of the first. If certificates of stock in mining corpora-

tions are to be treated in this respect as other personal property, it is evident the defendant became liable to the plaintiff for the proceeds of the ten shares sold to Martin.

But we think such certificates stand upon a different footing. Whilst stock in corporations is denominated personal property, and is subject to seizure and sale under execution, and whilst a particular certificate may be capable of complete identification, by its numbers or otherwise, the certificate is but the evidence that the holder of it is entitled to an undivided share in the assets and business of the corporation. The stockholders are the joint owners of the franchise and property of the corporation, each being entitled to an undivided share thereof, and the only office of the certificate is to furnish the evidence of the *quantum* of interest held by the owner of the certificate. "Certificates of stock are not securities for money in any sense; much less are they negotiable securities. They are simply the muniments and evidence of the holder's title to a given share in the property and franchises of the corporation of which he is a member." *Mechanics' Bank* v. *New York Railroad*, 13 N. Y. 626.

If a firm, doing business as an ordinary partnership, issue certificates to each of its members, specifying the interests of the respective copartners, such certificates would have no intrinsic value, except as evidence of the *quantum* of interest of each copartner. The joint interest of the copartner in the property and business of the firm is the substance, of the existence of which the certificate is but the evidence. If, for example, there be three copartners, each owning an undivided interest of one third, there is no appreciable difference between the respective interests. They are in all respects precisely similar, and each several interest is an exact duplicate of the others. The same principle is applicable to corporations. The holder of ten shares of stock stands precisely upon the same footing as any other holder of ten shares. Their interests are precisely similar and of the same value, and each holds but an undivided interest in the common property. This proposition is not new in this court, and is substantially decided in *Hawley* v. *Brumagim*, 33 Cal. 394; *Hardenbergh* v. *Bacon*, 33 Cal. 356.

The general rule is, as we have stated, that the owner of

personal property which has been wrongfully converted, is entitled to recover his specific property or its value, and can not be compelled to accept other property of the same kind and of equal value, in lieu of that which was converted. The reason of the rule is obvious. The owner may have special reasons for desiring to retain that specific chattel; and there may be reasons why he attached a peculiar value to it beyond the value of other chattels of a precisely similar kind. If his desire in this respect be the result of mere caprice, he is entitled to be gratified in the exercise of it. Visible, tangible chattels may have secret defects which no vigilance could detect. If two visible objects be apparently precisely similar, one may have infirmities not discoverable on inspection, which would impair or destroy its value. Hence the owner of such chattel can not be compelled to accept in lieu of it another which appears to be precisely similar and of equal value. He can not be required to take the risk of secret defects in the substituted article. Other considerations, also, affect the general rule. If a favorite horse, a pet dog, or a family picture be converted by a wrongdoer, he could not escape responsibility by offering another horse, dog, or picture, even of greater value.

But we think the reason of the rule ceases when applied to stocks. It is impossible that any sane person should have centered his affections upon a particular stock certificate, or that any violence could be done to his feelings by requiring him to accept another certificate of precisely similar character, in lieu of it. His own certificate was only the evidence that he owned an undivided interest in the capital and business of the corporation. Another certificate of the same kind, for the same amount of stock, would entitle him to precisely the same rights as the former certificate. Each would be a precise equivalent of the other, and it is certain he could suffer no pecuniary loss by the transaction; whilst the nature of the property, or rather of his interest in it, forbids the idea that it could be the object of personal attachment, or have a peculiar value in his estimation as contradistinguished from any other equal number of shares in the same company.

For these reasons, we think, a different rule should govern the conversion of a certificate of stock; and if the wrongdoer

was at all times ready and willing to transfer to the owner an equivalent number of similar shares in the same company, by a proper and valid certificate, it would present a case for nominal damages only.

Inasmuch as we have been referred to no adjudged case precisely similar to this, and the question involved being one of great practical importance, we propose to notice briefly the authorities relied upon.

Wilson v. *Little*, 2 N. Y. 443, cited by the plaintiff's counsel, was an action to recover the value of fifty shares of New York and Erie Railroad stock, deposited with the defendant as collateral security to secure the payment of a promissory note, with authority to sell the stock on non-payment of the note. The defendant sold the stock before maturity of the note, and the plaintiff afterward tendered payment and demanded a return of the stock. It appears the company had two kinds of stock, for which it had issued certificates; one termed the "consolidated," and the other the "converted," which had different values in the market, the former being the most valuable. The stock which was pledged was the "consolidated," and the defendant offered to return "converted" stock in lieu of that which he sold. The court very properly held that the plaintiff was under no obligation to accept a different kind of stock from that which was pledged.

In discussing this branch of the case, the court say: "The defendants were bound to restore the identical stock pledged." And in another part of the opinion: "Although the plaintiff was strictly entitled to a re-transfer of the same shares which were pledged, it appears that his broker was willing to receive other stock of the same description and value," etc. In the first paragraph quoted we understand the court to refer to "consolidated," as contradistinguished from converted stock; but if it be conceded that in strict law the plaintiff was entitled to a re-transfer of the same identical shares which were pledged, it by no means follows that he was entitled to any but nominal damages, if the defendant was at all times ready and willing to transfer to him an equal number of shares of the same kind of stock with that which was pledged.

Brookman v. *Rothschild*, 3 Sim., 6 Eng. Ch. 153, was a bill in chancery to set aside certain transactions in stocks on the

ground of fraud. The defendant was the plaintiff's agent, and rendered accounts showing large transactions in stocks for the plaintiff's account. It appeared on the trial that the stocks stood in the name of the defendant, and were never in any manner appropriated or set apart to the plaintiff. The court held that the stocks never became the property of the plaintiff, and he was therefore not liable for losses incurred by the sale of them.

Seymour v. *Wyckoff*, 10 N. Y. 213, was an action to recover the value of a quantity of pork in barrels, left with the defendants as commission merchants, for sale, and which was sold at ten dollars per barrel; but the plaintiff was not advised of the sale, and afterward, on discovering it, brought an action for the proceeds. The defense attempted to be set up was that the pork in question was only a portion of a much larger quantity belonging to the defendant, or consigned to him by others, and which had the same inspection brand, and was stored in the same warehouse, by reason of which it had lost its identity, like wheat mixed in a bin, and that so long as the defendant had on hand an equal quantity of pork of the same brand, he might apply the plaintiff's ownership to that parcel, and sell it on his account. This defense was held to be insufficient, as it manifestly was. But there is no analogy between pork in barrels, capable of complete identification, and having peculiar qualities, on which its value depends, and certificates of stock, having no value over other similar certificates for the same stock.

In *Ford* v. *Hopkins*, 1 Salk. 283, the plaintiff had delivered certain lottery tickets to a goldsmith to collect the money due on them. The goldsmith, having received of the defendant other tickets in the same lottery, and given his note for them, took up his note by delivering the plaintiff's tickets to the defendant.

The court held that the goldsmith had no authority, except to receive the money due on the tickets, and had no power to sell them or exchange them for other tickets; consequently no title passed to the defendant.

Nourse v. *Prime*, 4 John. Ch. 496, and which was more fully considered in 7 John. Ch. 87, is, in some respects, very similar to this case. The defendants were stockbrokers, and

had purchased for the plaintiff four hundred and thirty shares of United States Bank stock, and taken a transfer of the stock in their own names. The plaintiff having become largely indebted to the defendants, executed his promissory note to them for the amount, and agreed that they should hold the bank stock as collateral security; and the defendants thereupon executed and delivered to the plaintiff a writing, acknowledging that they held the stock as security for the note, and promising, on payment of the note, to "re-transfer" the stock and account for the dividends; but, in case the note was not duly paid, the defendants were to be at liberty to sell the stock, accounting to the plaintiff for the surplus, if any.

The defendants ultimately sold the stock at a depreciated price, which was not sufficient to pay the debt, and brought an action at law against the plaintiff for the deficiency. The plaintiff then filed this bill in equity, to enjoin the action at law, on the ground that the defendants were large operators in stocks, and had mingled his stock with their own and other stocks which they held in trust, in such manner that they could not be distinguished; that it was the duty of the defendants to have set apart the plaintiff's shares in such manner that they could be identified, and not having done so, they were liable for the highest price at which the stock could have been sold.

The defendants relied for their defense on the fact that the plaintiff had never requested them to set apart any particular four hundred and thirty shares, and that the custom was for brokers to keep all stocks of which they had control in their own names, not distinguishing one parcel from another; and that they at all times had enough of the stock of the United States Bank under their control to have replaced the plaintiff's stock, and were at all times ready and willing to do so on payment of the note. Chancellor Kent, in delivering his opinion in the case, puts it upon the ground that under the contract all that the plaintiff could demand was a return of four hundred and thirty shares of the stock of the bank, and if he desired to have any specific four hundred and thirty shares he should have so provided in the contract. He quotes, with approbation, the case of *Le Croy* v. *Eastman*, 10 Mod. 498, as follows:

"Here the defendant held £990 in South Sea stock, in trust for the plaintiff. The stock stood in his name, and he gave a note declaring the trust. Five hundred pounds of it was afterward transferred to the plaintiff, and a bill was filed for an account for the residue, at the then price of stock. The defendant admitted in his answer that he had mortgaged £1,000 of stock, and sold out all the stock in his own name, except £80; but he had more than enough in another person's name to have answered the trust, if the plaintiff had insisted upon a transfer; and he offered the residue of stock due to the plaintiff, amounting to £490, with the dividends. Lord Chancellor Parker held that the defendant was accountable only for the stock and dividends, and not for the price at which the stock was held. He observed that, as £100 South Sea stock was not to be 'specificated' from another, equity will never adjudge a man to have broken his trust in a higher degree when he may with equal reason be admitted to have broken it in a lower, and that the stock mortgaged must be esteemed the stock of the plaintiff, and the stock sold that of the defendant."

The cases of *Horton* v. *Morgan*, 6 Duer, 56, affirmed in 19 New York, 172, *Gilpin* v. *Howell*, 5 Pa. St. 42, and *Allen* v. *Dykers*, 3 Hill, 593, sustain the general proposition decided in *Nourse* v. *Prime*.

But in all these cases the stock stood in the name of the bailee, and it is claimed that the cases turned chiefly on this fact, and on the course of dealing between the parties, which established an implied agreement that the bailee might use the stocks as his own, and replace them with other similar stocks. But we do not so understand the cases; nor do we perceive any difference in principle between stocks standing in the name of the bailee and those standing in the name of the bailor, who has delivered to the bailee his certificates properly indorsed, and thereby placed it in the power of the bailee to transfer them into his own name at any time.

We hold, therefore, both upon reason and authority, that by the delivery to Martin of ten shares of the plaintiff's stock, the defendant, on the facts proved and found, did not become responsible to the plaintiff for the proceeds of the sale.

The same general principle applies to the transfer of the

fifteen shares to Donohoe, Ralston & Co., and the loan of five shares to Perry. The defendant was at all times able, and ready, and willing to transfer to the plaintiff the same number of shares of similar stock of the same company, and which had precisely the same value; and it is evident that if the defendant, in these transactions, committed a technical breach of his trust, it presents a case of *damnum absque injuria.*

"It is a good defense, or rather a good excuse, that the misconduct of the agent has been followed by no loss or damage whatever to the principal; for then the rule applies that, although there is a wrong, yet it is without any damage, and to maintain an action both must occur; for *damnum absque injuria* and *injuria absque damnum* are in general equally objections to any recovery." Story on Agency, Sec. 236.

The view we have taken of the case renders it unnecessary for us to discuss the sufficiency of the pleadings to support the judgment, or the question of ratification.

Judgment and order denying new trial reversed, and cause remanded for a new trial.

[The foregoing opinion was delivered at the April term, 1868. A rehearing was granted, and at the October term, 1871, the following opinion was given:]

By the Court, CROCKETT, J.

The questions of law presented on this appeal are extremely perplexing and difficult of solution. But after a careful re-examination of the points involved we adhere to the views expressed in the opinion heretofore delivered in the cause, which will stand as the opinion of the court.

Judgment reversed and cause remanded for a new trial.

BASSHOR ET AL. v. FORBES.

(36 Maryland, 151. Court of Appeals, 1872.)

Practice in Court of Appeals on exceptions to evidence. If, upon objection to evidence, it is admitted by the court, subject to exception, and the party objecting does not at a later stage of the trial move the court to exclude such evidence. the question of its admissibility can not be raised in the appellate court.

Parol evidence, when admissible. Proof of any collateral parol agreement, or independent fact, which does not interfere with the terms of the written contract, though it may relate to the same subject-matter, is admissible; and whether such collateral agreement was made, or independent fact occurred, contemporaneously with, or as preliminary to the main contract in writing, is quite immaterial.

Parol agreement to waive personal liability. A boiler, engine and appurtenances were purchased by an incorporated company, it being a part of the agreement that the purchase money should be secured by note and mortgage, and that the vendors should look only to the company and to the mortgage for the payment of the purchase money. The note and mortgage were duly delivered and accepted. In an action brought under the Personal Liability Act by the vendors against a stockholder of the company to recover on the note: *Held*, that the plaintiffs were not entitled to recover; and that any collateral agreement or the independent fact of the release of personal liability might be proved, whether preliminary to or contemporaneous with the written contract with the company.

Appeal from the Superior Court of Baltimore City.

This was an action by the appellants against the appellee, to recover from the latter as a stockholder of the Oakland Coal and Iron Company, of Baltimore, $4,692.38, with interest, alleged to be due by the company, on its note for that amount, dated the 28th of September, 1867, payable four months after date, for which it was alleged that the appellee was liable. because the whole amount of the capital stock of the company had not been paid in, and he was a stockholder thereof to an amount greater than the appellants' claim.

The appellants offered in evidence the certificate of incorporation, incorporating the company "for the purpose of carrying on the business of mining for coal and iron, and other metals and minerals." They also proved that the defendant, as director and general superintendent of the company, an

Joseph Wilkins, its president, were authorized to contract on behalf of the company for the purchase of a boiler and engine, to be erected on the company's lands in Allegany county, *for the working of a steam saw mill thereupon*, and that in pursuance of that authority they did, in the name and on behalf of the company, contract in writing therefor; the whole to be set and put in running order for $4,450; and the company's note at four months, secured by a mortgage on its property, to be given therefor; and that the appellants knew that the boiler and engine were meant to be used for a saw mill. They also proved that the note of the company, dated the 28th of September, 1867, at four months, for $4,692.38, secured by mortgage of its lands, was given for said engine and boiler, and for additional articles in and about its construction, amounting to $242.38. The appellee proved, subject to exception, that before the written contract for the purchase was executed, and when he called on the appellants to know upon what terms they would furnish the engine, boiler and appurtenances, and having agreed to do it for $4,450, they inquired about the means of the company; and being informed by the defendant that it had no money in its treasury, they proposed to take his individual note, to which he replied that he would not give it; that he had enough at stake in the company already, without risking a cent more, having purchased his interest as an investment, not as a stock speculation; that the appellants then asked if the directors would give their individual note, to which he replied that they would not, and added that the appellants would have abundant security in their boiler and engine, and eight hundred acres of land, and if they could get a mortgage from the company *in full satisfaction of their claim*, they would have abundant security; to which they replied, "very good," and agreed to take the company's note and mortgage, and deliver the machinery.

The appellee also proved that at the time of the execution of the contract one of the appellants told the president of the company that the appellee had refused to make himself individually responsible, as he had already invested enough in the enterprise, and had not bought the stock as a speculation; and that the appellee then told the appellants that they *must rely solely on their mortgage*. The appellee then also said that he

had been informed that there was coal and iron on the company's lands, but that he had been there and inquired and could find none, and that the only salvation of the stockholders was to use up the timber on the land, and they wanted the engine for that purpose. He also proved, on cross-examination by the appellants, that he *entered into the contract with the understanding that he was not, in any shape or form, to be responsible*, and told Basshor, before the contract was executed for the note and mortgage, that if he did not think it was safe on that security he had better not take it.

The appellee further proved that after the execution of the mortgage the mortgaged premises were offered for sale, upon an execution *prior in date to the mortgage*, and issued upon a judgment which had been rendered without the knowledge of the officers of the company; that upon having his attention directed to it by the sheriff's advertisement, he had called the appellants' attention to it, and that, after conversation between some of the officers of the company and the appellants, a paper had been executed between the appellants and Mr. Browning and left in possession of Mr. Browning, providing that if the appellants should buy the property at the sheriff's sale, Mr. Browning might redeem it by repaying the purchase money and the appellants' mortgage thereon. The appellee also proved, subject to exception, that it was afterward agreed between him and Mr. John F. Ehlen, on behalf of the company, and Basshor, on behalf of the appellants, that Basshor should bid in the property at the sheriff's sale for the appellants; that the appellee should assist him in making the purchase and lend the money to pay for it; that the company should have the privilege of redeeming the property, and, if it did not, the appellants should hold it *in full satisfaction* of all claims against the company. He also proved that notice was given at the sheriff's sale that the property was sold subject to a large claim of the appellants, and it was knocked down to Basshor for $620, the amount of the judgment; that the appellee lent him the money to pay for it; that Basshor paid to the sheriff the money so lent for that purpose and took from him a deed for the property in fee simple to the appellants; that the loan, with interest, was afterward repaid to the appellee, when it was understood that the appellants were to

keep the property; that they took possession of it immediately after the conveyance of it to them, and that the company had never exercised its privilege of redeeming. The appellee also proved that he had provided himself with a letter of credit for $16,000, and took it with him to Cumberland for the purpose of purchasing the property himself, and would have bought it, and would have gone as high as $11,000 or $12,000 on behalf of the company, but for the understanding with Basshor, under which he bought it without any adverse bid on the part either of the company or of the appellee; and proved that it was worth seven or eight thousand dollars when bought by the company.

The appellants then gave evidence tending to rebut the proof of the appellee as to the circumstances and understanding under which the original contract was made and the note and mortgage were given and accepted, and also as to the understanding under which the property was bought by the appellants through Basshor at the sheriff's sale; and, further, to show that there was no understanding between the parties outside of the original written contract and the paper prepared by Browning.

The plaintiffs then offered the following prayer:

If the jury shall find from the evidence that the five persons named in the certificate of incorporation of the Oakland Coal and Iron Company of Baltimore, offered in evidence by the plaintiffs, being free white persons and citizens of the State of Maryland, did make and sign the same and cause it to be recorded, in the year 1865, in the office of the clerk of the Superior Court of Baltimore city; that the said company has since become and still remains indebted to the plaintiffs; and that at the time that the said indebtedness was contracted the defendant was a stockholder in the said company to an amount greater, at the par value of his stock, than the amount of said indebtedness; and if the jury shall further find that the said company has never received from its stockholders, in payment of its stock, the full par value of said stock as fixed in said certificate of incorporation, then the jury are instructed that the plaintiffs are entitled to recover from the defendant in this action such amount as the jury may find to be due from said company to the plaintiffs.

The defendant offered the four following prayers:

1. If the jury believe from the evidence that the promissory note sued on was given for the purchase of a steam engine, boiler and appurtenances bought by the Oakland Coal and Iron Company from the plaintiffs for the purpose of working a saw mill, and the appurtenances to be used by said company for the manufacture of lumber for sale in the market, and that such purpose was known to the plaintiffs when they agreed to and did furnish and put up the said engine, boiler and appurtenances, then the said note was void, and the plaintiffs are not entitled to recover.

2. If the jury believe from the proof that the promissory note sued on was given for the purchase of a boiler, steam engine and appurtenances, and that it was part of the agreement of purchase that the purchase money should be secured by a promissory note, and a mortgage on the interest of the Oakland Coal and Iron Company in certain lands, and that the plaintiffs should look only to the company and to said mortgage for the price agreed to be paid for said engine, boiler and appurtenances, and shall further believe that said note was duly given according to the agreement, and said mortgage in like manner was duly executed and delivered to and accepted by the plaintiffs, then they are not entitled to recover in this action.

3. If they believe that the interest of the Oakland Coal and Iron Company in certain lands lying in Allegany county, and in the engine, for the price of which the note offered in evidence was given, was bought at sheriff's sale by and was conveyed to the plaintiff, Basshor, under an agreement previously made between him, acting for both the plaintiffs, and Forbes, acting for the said company, that said Forbes would aid him in making and paying for said purchase, and that if said property was not redeemed by said company it should be held by said Basshor for the plaintiffs in satisfaction of the debt due by said company to them; and shall further believe that said Forbes did so aid said Basshor in making and paying for said purchase, then the plaintiffs are not entitled to recover in this suit; it being admitted that the said property was not redeemed by said company.

4. If the jury believe from the evidence that the fee simple title to the property covered by the mortgage offered in

evidence was acquired by the plaintiff, Basshor, after the execution and recording of the said mortgage on behalf of him, the said Basshor, and his copartner, and that said Basshor, for himself and his partner, has since sold and disposed of the same, then the plaintiffs are not entitled to recover.

The court (DOBBIN, J.), rejected the first and the fourth prayers of the defendant, and granted his second and third in connection with the plaintiff's prayer, which it refused to grant, except with the qualification contained in the said second and third prayers of the defendant, but did grant it with such qualification. The plaintiffs excepted to the refusal of the court to grant their prayer without qualification, and also to the qualification and to the granting of the defendants' second and third prayers; and the verdict and judgment being against them, they appealed.

The cause was argued before BARTOL, C. J., BOWIE, GRASON, MILLER, ALVEY and ROBINSON, J.

THOMAS ROWLAND and JOHN THOMSON MASON, for the appellants.

S. TEACKLE WALLIS, for the appellee.

ALVEY, J., delivered the opinion of the court.

The question as to the admissibility of the parol evidence offered by the defendant in the court below, and which was objected to at the time by the plaintiffs, but admitted by the court subject to exception, is not before this court for review, inasmuch as the court was not at any subsequent stage of the trial invoked to exclude such evidence, and exception taken to its refusal so to do. Whether the evidence was really admissible, the court below does not appear to have definitively decided. All that was done by the court was to allow the evidence to be given, subject to the exception of the plaintiffs, which might be insisted on at some later period in the course of the trial, when the question of the admissibility or inadmissibility of the evidence could be better understood than at the moment when offered. This course is frequently pursued in order to facilitate the trial, and as a means of more

fully understanding the relation and bearing of the proffered evidence to and upon the issue involved, than can be well seen in the early progress and development of the cause. The practice in this respect is most generally regulated by rule of court; but in all such cases, if the party objecting to the evidence intends to insist upon his objection taken in the first instance, he should, before or at the close of the evidence, apply to the court, either by motion or prayer, to exclude the evidence objected to, and thus have the question of the admissibility of the evidence definitively disposed of, and to the final ruling on this latter application the exception, if desired, should be taken. If this is not done the benefit of the original objection can not be availed of here, for the obvious reason that there has been no final decision of the question in the court below; and the mere statement in the bill of exception that certain evidence was offered and objected to, but admitted subject to the objection, to be disposed of at a subsequent stage of the trial, does not by any means raise the question here as to the admissibility of such evidence. This proposition was, in effect, decided in the case of *Coates* v. *Sangston*, 5 Md. 121.

But if the question of the admissibility of this evidence was properly before us, we could have no hesitation in declaring the evidence admissible for the purpose for which it was offered. It was not, as supposed by the learned counsel for the plaintiffs, liable to objection on the ground that it tended to contradict, add to, or vary the written contract between the plaintiffs and the Oakland Coal and Iron Company. It had reference to a collateral matter, and about which the contract was silent. The individual liability of the defendant as stockholder in the company is not provided for by the terms of the contract, but, if it exists at all, can only exist as a statutory incident to such contract, and as collateral to the obligation of the company. The liability of the stockholder is, in one sense, founded in contract, it is true, but such liability is so far collateral to and independent of that of the corporation on the contract itself, that it may be waived or discharged without in any manner affecting or impairing the direct corporate liability. It was the object of the evidence offered to show that the individual liability of the stockholder was waived and

excluded by showing that the plaintiffs had entered into the contract with the company with the distinct understanding that they were to look to and rely upon the security furnished by the company, *alone and exclusively*, and that without such understanding the contract would not have been made on the part of the corporation represented by the defendant. This evidence we think was competent and admissible, and the objection taken to it wholly untenable.

The rule of exclusion, relied on by the plaintiffs' counsel, is in no way infringed by the introduction of the evidence objected to; for it is well settled by the most unquestionable authorities, that proof is admissible of any collateral parol agreement, or independent fact, which does not *interfere with the terms of the written contract*, though it may relate to the same subject-matter; and whether such collateral agreement was made, or independent fact occurred, contemporaneously with, or as preliminary to, the main contract in writing, is quite immaterial: *Lindley* v. *Lacey*, 17 Com. B. (N. S.) 578; 2 Taylor's Evidence, Secs. 1038, 1049. And this principle has been very fully and explicitly sanctioned by this court in the cases of *McCreary* v. *McCreary*, 5 G. & J. 147; *Creamer* v. *Stephenson*, 15 Md. 211.

Having said that the parol evidence objected to was admissible for the purpose for which it was offered, it follows necessarily that, in our opinion, the court below was right in granting the defendant's second prayer. That prayer submitted to the jury to find, that if it was agreed at the time of the purchase from the plaintiffs of the boiler, steam engine and appurtenances, that they, the plaintiffs, should rely *only* upon the responsibility of the company, and the sufficiency of the mortgage and note taken for the price of the articles sold or furnished for payment, then the plaintiffs were not entitled to recover. Of the correctness of this proposition we think there can be no doubt.

It is contended, however, that because it was proved that the parties to the contract did not know, at the time it was entered into, of the existence of the statute imposing the individual liability upon the stockholders for the debts of the corporation, therefore the plaintiffs can not be supposed to have intended to waive such liability. But if it be true, as was submitted to the jury to find, that it was distinctly agreed that the plaint-

iffs were to rely alone upon the liability and security of the company, and no other, it would be anything but just or fair to allow them to hold the defendant liable upon the theory suggested. We think in reason it can not be done.

As to the defendant's third prayer, we think that was properly granted also. If the facts therein enumerated were found by the jury, they clearly constituted a discharge and satisfaction of the claim, by the express agreement of the plaintiffs; and of course with that being done, all pretense for holding the defendant liable ceased to exist.

Finding no error in the ruling of the court below, its judgment will be affirmed.

Judgment affirmed.

HACKER v. THE NATIONAL OIL REFINING CO.

(73 Pennsylvania State, 93. Supreme Court, 1873.)

Note of stockholder for stock. By the act of July 18, 1863, (Manufacturing Companies,) a note given after the organization of the company for additional stock is valid, notwithstanding the provision in the act that "no note given by a stockholder shall be payment of any part of the capital stock."

[1] **Parol evidence to qualify note.** Evidence of a parol agreement, at the execution of a note given for additional stock in a manufacturing company, that the note was not to be paid except on a contingency, is inadmissible.

Right of subscriber to demand stock. Hacker subscribed for additional stock in a corporation and she gave her note for the amount; a certificate was tendered her and refused and no credit was given her in the stock ledger: *Held*, the note was not without consideration; she had the right to demand and receive the stock.

Error to the District Court of Philadelphia.

This was an action of assumpsit by The National Oil Refining Company against Harriet B. Hacker. The writ was issued to March term, 1869, of the court below.

The cause of action was a promissory note for $2,041, dated

[1] See *Basshor* v. *Forbes*, 13 M. R. 530.

October 10, 1866, drawn by the defendant, payable four months after date to the order of James H. Stevenson, indorsed by him and held by the plaintiffs.

On the trial, May 3, 1870, before STROUD, J., the plaintiffs gave the note in evidence and rested.

The defendant offered to prove that she was a subscriber for 500 shares of the stock of the National Oil Refining Company; that she was solicited by the said Stevenson, then the treasurer of the said company, to subscribe for additional shares of the stock of said company, at $10 per share; that she agreed with him orally to subscribe for 200 additional shares, provided she should receive $2,000 from Jeremiah L. Hutchinson, in part payment of his bond and mortgage to her, of which $2,250 would become due November 13, 1866; that this note was given by her on the 10th of October, 1866, at the instance of the said Stevenson, who drew it up for her signature, and was for the par value of the shares of stock with interest from date to the maturity of the note; that Mr. Hutchinson paid no part of this sum of money before the maturity of the note, nor until the year 1868; that having failed to receive the payment from him, she notified said Stevenson that she declined to take the stock; that she never received any certificate of the stock; that this note was taken in payment of such stock, and that there was no credit to her on the books of the company of this stock.

The court refused the offer, and sealed a bill of exceptions.

James H. Stevenson testified: "I am treasurer of the plaintiffs; on the 10th of October, 1866, this note was given for a subscription for stock of the company, made by a nephew of hers, Wm. B. McMain, at a meeting called at the National Oil Refining Company's works; Mrs. Hacker subscribed through him, at a stockholders' meeting called in August, 1866, for obtaining additional working capital. The subscription was not made in writing, but in the presence of the stockholders, and a record was made at the time by the secretary. It was announced at the meeting that subscriptions for additional stock would be made, and Mr. McMain announced his subscription of 200 shares for Mrs. Hacker. A certificate of 200 shares was tendered to Mrs. Hacker. It was announced that a subscription of a former subscriber would entitle the sub-

scriber to have the stock at $8 a share. I wrote the date and amount. Mr. McMain brought the note to me signed. I called upon her afterward and showed it to her, and she said it was all right. Mr. McMain filled up the blank with my name."

Defendant called Henry C. Stevenson, who testified that he was the secretary of the said company. The stock register of said company showed the following entry: "Harriet B. Hacker, October 13th, 1866, for 500 shares." There was no other entry relating to Mrs. Hacker in it, except one in pencil in these words: "H. B. Hacker refuses to accept." The note in suit did not appear in the balance sheets of the company for the years 1866, 1867, 1868 and 1869; he had never stated to Mr. Washington Bladen or Mr. Robert L. Allen that the note in suit was a private matter of Mr. James H. Stevenson, and that the company had nothing to do with it.

The defendant called Robert L. Allen, and offered to prove by him that the said Henry C. Stevenson had said to him, in answer to an inquiry made by him as the attorney in fact of the defendant, that the note in suit was a personal matter of Mr. James H. Stevenson, and not the property of the company.

To the admission of this offer the plaintiffs objected; it was rejected by the court, and a bill of objections sealed.

The defendant gave in evidence letters patent, showing the incorporation of the plaintiffs under the act of July 18, 1863 (Pamph. L. 1864, 1102, 2 Br. Purd. 1407).

The defendant's points were:

1. Under the provisions of the act of 18th July, 1863, the plaintiffs were not authorized to take a promissory note in payment for stock subscribed. Consequently, if the note in suit was given by defendant in payment for stock agreed to be subscribed by her, no recovery can be had upon it.

2. If the note in suit was given by defendant for shares of stock verbally agreed to be subscribed by her, it could not, under the provisions of the act of 18th July, 1863, be considered as payment therefor; consequently no title to the stock passed to her. She did not become a holder of such stock, or entitled to the rights and privileges of a stockholder. There was no mutuality of obligation. The note was without consideration, and no recovery can be had on it. The plaintiffs'

remedy, if any they have, is on the alleged agreement to subscribe, and not on the note.

Both points were refused, the judge saying that he did not consider anything thus presented to him as matter of defense.

The verdict was for the plaintiffs for $2,434.57.

The following are sections of the act of July 18, 1863:

"Sect. 11. The capital stock of every company, the amount whereof has been fixed and limited by such company according to law, shall remain so fixed, subject to be increased or reduced pursuant to the provisions of this act.

"Sect. 13. Every company may, at any meeting called for that purpose, increase its capital stock and the number of shares therein, etc.

"Sect. 16. Every company may, from time to time, at a legal meeting called for the purpose, *assess* upon each share of stock such sums of money as the company may think proper, not exceeding the whole amount at which each share was originally limited. And such sums assessed shall be paid to the treasurer at such times and in such installments as the company directs, and no note or obligation given by a stockholder, whether secured by pledge or otherwise, shall be considered as payment of any part of the capital stock.

"Sect. 17. If the proprietor of any share neglect to pay a sum duly assessed thereon, for the space of thirty days after the time appointed for payment, the treasurer of the company may sell by public auction, a sufficient number of the shares to pay all assessments then due, etc."

The defendant removed the record to the Supreme Court and assigned for error:

1 and 2. Rejecting the defendant's offer of evidence.

3 and 4. Refusing to affirm the defendant's points.

J. CADWALADER and E. S. MILLER, for plaintiff in error, cited as their first point, *Hibernia Turnpike* v. *Henderson*, 8 S. & R. 219; *Leighty* v. *Susquehanna Turnpike*, 14 Id. 434; *Ogle* v. *Somerset Turnpike*, 13 Id. 256; *President, etc.*, v. *McConahy*, 16 Id. 147; *Clark* v. *Monongahela Nav. Co.*, 10 Watts, 364.

On the second point, *Essex Turnpike* v. *Collins*, 8 Mass. 292; *Taunton Turnpike* v. *Whiting*, 10 Id. 327.

T. F. CLAYTON, for defendants in error.

The opinion of the court was delivered, May 17, 1873, by WILLIAMS, J.

There was no error in rejecting the offer of evidence set out in the bill of exception embraced in the first specification. It was an offer to prove in substance a contemporaneous parol agreement at variance with the written contract, without any allegation or offer to show that the note was given or obtained by fraud or mistake. It is too well settled to admit of doubt that such evidence is inadmissible: *Anspach* v. *Bast*, 2 P. F. Smith, 356. It did not tend to prove that the consideration for which the note was given had failed. There was no offer to show that the company had no stock which it was authorized to issue or sell, and it was not bound to transfer the stock on its books, or to deliver a certificate therefor to the defendant until the payment of the note. Nor was there error in rejecting the offer embraced in the second specification. If the evidence was offered for the purpose of contradicting the testimony of Henry C. Stevenson, the secretary of the company, it was rightly rejected, for it was not competent for the defendant to contradict the testimony of her own witness. If it was offered as a declaration or admission binding the company, it was inadmissible, because it was not within the scope of his authority, or in the course of his business as secretary of the company; and it was not offered to be shown that he had express authority to make the declaration.

The next specification presents the question, whether the company was authorized under its charter to take a promissory note for the stock subscribed by the defendant, and whether a recovery can be had thereon in this action. The company was organized under the act of 18th of July, 1863, Pamph. L. 1864, p. 1102, the 16th section of which provides "that every company may, from time to time, at a legal meeting called for the purpose, assess upon each share of stock such sums of money as the company may think proper, not exceeding in the whole the amount at which each share was originally limited; and such sums assessed shall be paid to the treasurer at such times and in such installments as the company directs; no note or obligation given by a stockholder, whether secured by

pledge or otherwise, shall be considered as payment of any part of the capital stock." It is strenuously contended that under the latter provision of this section, the company had no authority to take the note in payment of the defendant's subscription. But the clause does not in terms forbid the corporation from taking a note or obligation from a stockholder. On the contrary, it impliedly admits the right, but declares that no such note or obligation, however secured, shall be considered as *payment* of any part of its capital stock; and the reason is found in the next section, which authorizes the sale of the stock for non-payment of the assessments for the space of thirty days after the time appointed for payment. It is obvious that if a note given for the assessments was to be considered as payment, the authority of sale could not be exercised. The cases of the *Hibernia Turnpike* v. *Henderson*, 8 S. & R. 219, and *Leighty* v. *The Susquehanna Turnpike*, 14 Id. 434, have no application to the subscription in this case. In each of these cases the subscription was made to the commissioners prior to the organization of the company, under acts of incorporation requiring the payment of a specific sum on each share subscribed at the time of making the subscription.

In one case the subscriber paid nothing, and in the other gave a note for the amount required to be paid, and the subscriptions were held to be void, and the company not entitled to recover thereon. And why? For the simple reason that the giving of a note was not payment of money within the meaning of the act, and a subscription without such payment conferred no rights on the subscriber, and therefore neither the commissioners nor the future company would enforce payment by action.

But here the defendant's subscription was made to the company after it was organized, under an express authority given by the act, to increase its capital stock; and therefore, as ruled in *The Erie Plank Road* v. *Brown*, 1 Casey, 156, and *The Philadelphia Railroad* v. *Hickman*, 4 Id. 318, it had authority to accept subscriptions on such terms, as to time and mode of payment, as might in the exercise of a sound discretion be regarded for the best interests of the company. Nor was the note without consideration. It was given for the stock subscribed by the defendant, and though it was not transferred on

the company's books, nor a certificate therefor delivered to the defendant at the time the note was given, she was entitled to demand and receive the stock on payment of the note. The contract was mutually obligatory. The defendant was bound to pay the note when it became due, and the company was bound to transfer and deliver to her the stock for which she subscribed; and the evidence shows that before bringing suit the company tendered her a certificate for the stock.

Judgment affirmed.

BERCICH v. MARYE.

(9 Nevada, 312. Supreme Court, 1874.)

[1] **Broker's liability for stolen stock sold on commission.** A broker received and sold certificates of stock in a California mining company, which were transferred in blank, and after deducting his commission and charges, paid over the balance of the proceeds to the person from whom he had received the stock. The stock had in fact been stolen, and the by-laws of the company provided that no transfer of stock should be valid, except between the parties thereto, unless entered on the books of the company: *Held*, that the broker was liable to the true owner for the value of the stock and damages.

[2] **Unregistered transfers of stock** under the laws of California, except between the contracting parties, do not pass the title.

One who without authority of the owner sells his property is guilty of conversion although he has acted under the authority of one claiming to be the owner, and was ignorant of such person's want of title.

Measure of damages for conversion of stock. The measure of damages in trover for the conversion of mining stock is its market value; but in the statutory action of claim and delivery of personal property, in case return be not made, the value at time of trial with the addition of dividends since conversion is the only complete remedy.

Appeal from the District Court of the First Judicial District, Storey County.

This was an action under the statute on claim and delivery of personal property, such as is usually known as an action of

[1] *Barstow* v. *Savage M. Co.*, 64 Cal. 388; 49 Am. R. 705; *Skillman* v. *Lachman*, 11 M. R. 381.

[2] *State* v. *Pettineli*, 12 M. R. 513.

replevin. The plaintiff demanded the restitution of certain mining stock described in the opinion, or its value and damages in the sum of seven hundred and seventy dollars in case a return could not be had. It appeared that the stock had been taken to defendant, who was a stockbroker in Virginia City, by a person giving his name as Bernarge. Defendant received and sold it, and after deducting his commission and charges, paid over the balance of the proceeds to Bernarge. As a matter of fact the stock had been stolen from plaintiff, who, as soon as he found out his loss, published notice thereof. On November 8, 1873, when demand was made upon defendant by plaintiff for the stock, Belcher was worth $77.50 and Caledonia $7 per share. It also appeared that $95 in dividends had been declared on the Belcher stock before the trial, and that $70 of it had actually been paid. Plaintiff had judgment for the return of the stock, or, in case a return could not be had, for $724, as the value thereof, and interest from November 8, 1873, and costs; and for $95 damages for detention, which latter sum was afterward reduced by the court below to $70. Defendant appealed from the judgment.

M. N. STONE, for appellant.

LEWIS & DEAL and J. A. STEPHENS, for respondent.

By the Court, BELKNAP, J.

Judgment in the alternative was rendered against the defendant for the restitution of five shares of the capital stock of the Belcher Silver Mining Company and twenty shares of the capital stock of the Caledonia Silver Mining Company, or the value thereof, and damages, under section 202 of the Practice Act. The shares were transferred in blank and were stolen from the plaintiff. The defendant is a broker, engaged in buying and selling mining stocks. He received the certificates stated in the usual course of his business from a stranger, sold them upon commission and paid him the proceeds. The first objection made by the appellant is that certificates of stock should be treated as negotiable instruments, and the defendant being a *bona fide* holder for a valuable consideration no recovery can be had against him.

By the statutes of California under which the Belcher and Caledonia Silver Mining Companies were incorporated, it is enacted: "The stock of the company shall be deemed personal estate, and shall be transferable in such manner as may be prescribed by the by-laws of the company; but no transfer shall be valid, except between the parties thereto, until the same shall have been so entered on the books of the company as to show the names of the parties, by and to whom transferred, the number and designation of the shares, and the date of the transfer:" 1 Hittell's Gen. Laws, p. 148, Sec. 9. This restriction upon the transfer of stock determines the question of negotiability adversely to appellant. The legal title to the shares, except as between the parties, can be acquired only by transfer upon the books of the corporation. Any other form of assignment is merely equitable as against the corporation and is subject to its liens or claims: *Union Bank* v. *Laird*, 2 Wheat. 390; *Shaw* v. *Spencer*, 100 Mass. 382; *Mechanics' Bank* v. *N. Y. & N. H. R. R. Co.*, 13 N. Y. 599.

It is next objected that, as the defendant was the innocent agent of the person from whom he received the shares of stock, without knowledge of the felony, no judgment should have been rendered against him. It is well settled that agency is no defense to an action of trover, to which the present action is analogous. In applying this doctrine the Supreme Judicial Court of Maine said: "If the principal is a wrongdoer, the agent is a wrongdoer also. A person is guilty of a conversion who sells the property of another, without authority from the owner, notwithstanding he acts under the authority of one claiming to be the owner, and is ignorant of such person's want of title:" *Kimball* v. *Billings*, 55 Me. 147; *Koch* v. *Branch*, 44 Mo. 543; *Hoffman* v. *Carow*, 22 Wend. 285.

In ascertaining the measure of damages the court allowed the market value of the stock at the date of conversion. Such is the rule in trover; but this is a statutory action for the return of the property or its value in case a delivery can not be had, and damages for the detention. Upon failure to return the property in specie the statute provides for the indemnification of the owner. The value of the stock at the day of trial, together with the dividends that have been paid upon it as

damages for the detention, is the only complete indemnity in such case: *O'Meara* v. *North American M. Co.*, 2 Nev. 112; *Boylan* v. *Huguet*, 8 Nev. 355, and cases there cited. For this the judgment must be reversed and a new trial granted.

It is so ordered.

SHERWOOD v. THE MEADOW VALLEY MINING CO.

(50 California, 412. Supreme Court, 1875.)

[1] **Certificates of stock in a corporation are not negotiable securities** in a commercial sense, but are mere muniments and evidences of the holder's title to a given share in the property and franchises of the corporation of which he is a member.

[2] **Innocent holder of unregistered stock.** If the holder indorses the certificate by writing his name upon the back, without causing the same to be transferred upon the books of the company, and thereupon delivers it to a third person who loses it, an innocent purchaser from the finder acquires no title to the stock.

Appeal from the District Court, Fourth Judicial District City and County of San Francisco.

On the 30th day of November, 1872, Henry Schmeidell, a broker in San Francisco, owned twenty shares of the stock of the defendant, a corporation organized for mining purposes, and received the following certificate:

"Twenty Shares. No. 7405.

"MEADOW VALLEY MINING COMPANY.

"Incorporated May 15th, 1869.

"Capital $6,000,000. 60,000 shares—$100 each.

"SAN FRANCISCO, November 30, 1872.

"This certifies that H. Schmeidell, trustee, is the owner of twenty (20) shares of the capital stock of the Meadow Valley Mining Company, transferable on the books of the company by indorsement hereon and surrender of this certificate.

"T. W. COLBURN, Secretary.

"AUG. J. BOWIE, JR., Vice-President.

[1] *Shaw* v. *Spencer*, 100 Mass. 382; 1 Am. R. 115.

[2] *Skillman* v. *Lachman*, 11 M. R. 381; *Newton* v. *Porter*, 69 N. Y. 133; 25 Am. R. 152; *Pratt* v. *Taunton Copper Co.*, 123 Mass. 110; 25 Am. R. 37.

"Location of works: Lincoln County, Nevada.

"Indorsed: HENRY SCHMEIDELL, Trustee.

"Witness: N. K. MASTEN."

The stock was entered on the books of the company in the name of "Henry Schmeidell, trustee." On said 30th of November, Schmeidell sold twenty shares of stock to B. Levy, and indorsed the certificate, "H. Schmeidell, trustee," and delivered it to him, but no change was made on the books of the company, nor did Levy inform the company of his purchase. On the 7th day of April, 1873, Levy lost the certificate. On the 8th day of April, 1873, he notified the corporation of his loss, and having indemnified it, on the 19th of May following, the company gave him a new certificate, a copy of the old one. On the 7th of April, 1873, the plaintiff, who was also a stockbroker, purchased, in the usual course of business, twenty shares of the stock of said corporation, and H. Morrison, who sold the same, delivered him the certificate which Levy had lost. Sherwood paid value, and did not know of Levy's loss. On the 2d day of July, 1873, Sherwood, still ignorant that the certificate was not good, and of Levy's loss, presented it to the corporation and demanded a new certificate to be issued to him. The company refused. By the custom of brokers in San Francisco, certificates drawn as this was, and indorsed, pass from hand to hand, by mere delivery, without any transfer on the books of the company. This was an application for a writ of mandate to compel the corporation to issue a new certificate to the plaintiff. The court below refused to issue the writ, and the plaintiff appealed.

J. W. WINANS, for the appellant.

The certificate of stock, No. 7405, was a negotiable or *quasi* negotiable instrument, and gave the holder thereof the title to the stock it represented: *Mechanics' Bank* v. *N. Y. R. R.*, 4 Duer, 538, 539, 540; *Leavitt* v. *Fisher*, 4 Id. 20; *Fatman* v. *Lobach*, 1 Id. 354; *Commercial Bank* v. *Kortright*, 22 Wend. 360; *Fisher* v. *Morris Canal*, Court of Appeals (N. J.), Nov., 1854, Com. Law Register, May, 1855, p. 423; *Wheeler* v. *Guild*, 20 Pick. 545; 2 Parsons on Notes and Bills, 268; *N. Y. R. R.* v. *Schuyler*, 34 N. Y. 82.

Under the custom and practice and long established usage among brokers and dealers in the stock market, upon making

sales and purchases of stocks, the certificates thereof, indorsed by the party in whose name they are issued, are passed from hand to hand as having the force and effect of negotiable instruments without transfer on the books of the company which issued them, and when so passed from hand to hand, any such certificate has the force and effect of negotiable paper, at least to the extent of being good against the claim of a party who lost it, or from whom it was stolen, when the holder took it *bona fide* for a valuable consideration, and in the due course of trade: 2 Parsons on Contracts, 52, 53, 55; *Commercial Bank* v. *Kortright*, 22 Wend. 348; *Smith* v. *Wright*, 1 Caine's Rep. 43; *Hinton* v. *Locke*, 5 Hill, 437; *Outwater* v. *Nelson*, 20 Barb. 29.

CRANE & BOYD, for the respondent.

Assuming that the capital stock of the company was divided into 60,000 shares, this particular certificate represented $\frac{20}{60000}$ undivided parts of the assets and business of the corporation, and nothing more: *Harris* v. *S. F. R. R. Co.*, 41 Cal. 408; *Atkins* v. *Gamble*, 42 Cal. 99.

But it did not represent shares which could be segregated from the other shares by any particular ear-mark. In other words, one share was as good as another: *Hardenbergh* v. *Bacon*, 33 Cal. 384; *Hawley* v. *Brumagim*, 33 Cal. 394; *Brewster* v. *Sime*, 42 Cal. 139; Angell on Corporations, Secs. 564, 565.

A certificate of stock is neither a negotiable nor a *quasi* negotiable instrument: Civil Code, Sec. 3087; *Mechanics' Bank* v. *N. Y. R. R.*, 13 N. Y. 623, 627, 628, 629; 34 N. Y. 72; *Farmers' Bank* v. *Butchers' Bank*, 14 N. Y. 633; *Hart* v. *Lauman*, 29 Barb. 417. Nor is it a "security." *Graydon* v. *Graydon*, Am. Law Reg. June, 1873; 23 N. J. Eq. 229.

BY THE COURT.

In *Atkins* v. *Gamble*, 42 Cal. 99, we held that certificates of stock in a corporation are not negotiable securities in a commercial sense; but are mere muniments and evidences of the holder's title to a given share in the property and franchises of the corporation of which he is a member. We do

not think it necessary to again go over the reasoning, or engage in a review of the authorities by which the conclusion is maintained. Mr. Parsons, in a note to the sixth edition of his work on Contracts (Vol. 1, p. 290), after a somewhat extended citation of the authorities upon the general subject, says:

"The result would seem to be that all corporation bonds and government stocks, which pass by delivery, or indorsement with delivery, are negotiable; but that certificates of stock in a corporation are not."

The question underwent an exhaustive consideration by the Court of Appeals of the State of New York, in the year 1856, in *Mechanics' Bank* v. *N. Y. & N. H. R. R.*, 13 N. Y. 599, and the opinion of the court, delivered by Justice Comstock, contains a masterly exposition of the principles of law and a citation and comparison of the judicial decisions applicable to the question.

We are of opinion that upon the agreed facts of the case, the judgment of the court below was correctly entered in favor of the defendants.

Judgment affirmed.

THE SAN BUENAVENTURA COMMERCIAL MINING AND MANUFACTURING CO. ET AL. v. VASSAULT ET AL.

(50 California, 534. Supreme Court, 1875.)

[1] **Notice of annual meeting, when required.** The annual meeting of the stockholders of a corporation for the purpose of electing a board of trustees, as required by statute, can not, unless all the stockholders be actually present, and consenting in person or by proxy, be legally held until after notice of the time and place thereof given in some authentic and legal mode.

[2] **Idem - Time fixed in by-law.** The fact that a by-law of the corporation designates "the third Monday in April, at the office of the company, in San Francisco," as the time and place for the meeting, does not dispense with the notice, as no hour is named.

Appeal from the District Court, Nineteenth Judicial District, City and County of San Francisco.

[1] *Farwell* v. *Houghton Copper Works*, 8 Fed. 66; *Kenton Furnace* v. *McAlpin*, 5 Id. 737.

[2] *State* v. *Pettineli*, 12 M. R. 513.

The San Buenaventura Commercial Mining and Manufacturing Company was a corporation organized in 1866. The 12th article of its by-laws was as follows:

"The annual meetings of the stockholders shall be held on the third Monday in April, at the office of the company in San Francisco.

"All meetings of stockholders shall be called by the president and secretary, by publishing a notice for ten (10) days, Sundays included, in a daily newspaper printed and published in San Francisco, and mailing in the post office at San Francisco a similar notice, addressed to each stockholder, whose post office address shall be left with the secretary.

"A majority of the stock represented at any meeting of the stockholders duly called, or at the annual meeting of the stockholders, shall have power to transact business, and to vote to bind the corporation."

The year preceding the third Monday in April, 1872, Conway was president of the corporation. Its capital stock consisted of twenty-five thousand shares of the par value of one hundred dollars each. On the third Monday in April, 1872, at four o'clock P. M., at the office of the company, stockholders representing about six thousand shares met and elected a board of trustees. Other stockholders, owning about five thousand shares, were present, but refused to vote, although invited to do so. No notice of this meeting was given. The board thus elected assumed to act as trustees during the ensuing year; elected a president and secretary, and during the year, levied an assessment of one dollar per share, and upon the non-payment of the same by a large number of stockholders, sold their stock and had it bid in by the company. The annual meeting was about to be held on the third Monday in April, 1873, at which the officers claimed the right to exclude from voting those stockholders whose stock had been sold for the assessment, when this action was commenced by the corporation, and some of the stockholders whose shares had been sold, on behalf of themselves and other stockholders who might choose to avail themselves of the benefit thereof, to set aside the sale made of the stock and all contracts made by the corporation during the year, and to enjoin the proposed meeting on the third Monday in April, 1873, and to enjoin the

defendants from acting as officers of the company, unless thereafter properly elected. A preliminary injunction was granted. The defendants were the officers elected at the stockholders' meeting in 1872. The court below gave judgment in favor of the defendants, and the plaintiffs appealed.

The other facts are stated in the opinion.

CRANE & BOYD, for the appellants.

E. D. SAWYER and A. W. THOMPSON, for the respondents

BY THE COURT.

The general question to be determined concerns the validity of the election of Vassault and others as members of the board of trustees of the corporation plaintiff. Several minor questions, supposed to affect the principal question stated, were made at bar. It is claimed that the by-laws of the corporation do not provide for an annual meeting at which less than a majority of the entire stock is represented, and that such a by-law, even if attempted, is not authorized by the statute. The views we entertain as to the necessity of notice, and the sufficiency of the notice under which the stockholders' meeting in this instance was held, render it unnecessary for us to express an opinion upon the other questions referred to.

The statute (Hitt., Sec. 936) requires that the board of trustees shall be "annually elected by the stockholders, at such time and place, and upon such notice * * * as shall be directed by the by-laws of the company." The plain meaning of this is that the annual meeting can not, unless *all* the stockholders be actually present and consenting, in person or by proxy, be legally held until after notice of the time and place thereof first be given in *some* authentic and legal mode. Here there was none given, unless we consider that the first clause of the twelfth by-law of this corporation of itself operated the requisite notice. That clause is as follows: "The annual meetings of the stockholders shall be held on the third Monday in April, at the office of the company, in San Francisco."

Conceding that this by-law is notice *per se* that the annual

meeting of stockholders will be held on *the third Monday in April of each year*, it is insufficient as a notice of the *point of time during that day* at which the meeting is to be held.

Had the by-law in question provided that the annual meeting should be held in the *third week* of the month of April of each year, it would have been clearly insufficient as a notice of the *time* at which the meeting would be held, and would have been construed as merely directing the proper officers to give notice of a meeting to be held at some specified time during the designated week.

The fact that the by-law here names a *day* upon which, instead of a *week* within which, the annual meeting is to be held, while it may diminish, does not remove the uncertainty as to the time at which it is to be held. A meeting held on that day, at any time within the business hours customarily observed in San Francisco, might be fairly claimed to have been held pursuant to the notice. A body of the stockholders might meet at ten o'clock A. M. of that day, and proceed to transact the business of the annual meeting, including the election of trustees; at a later hour of the same day—say at twelve o'clock M.—another body of the stockholders, it may be representing the actual majority of the stock, might convene and proceed to elect a different board of trustees, and each of these bodies might equally claim to have proceeded pursuant to the notice contained in the by-law of the corporation. In view of the frequent and constantly recurring struggles by different combinations of stockholders to obtain control of the corporate direction, often resulting in serious embarrassment to the corporate interests, it is highly important that the notice should be so definite and certain in its character as to leave no room for controversies such as the one now before us.

The court below held that a meeting of a portion of the stockholders convened on the third Monday of April, 1873, without notice, other than such notice as was operated by the first clause of the twelfth by-law already recited, was regular and legal. The opinion of the court, sent up in the record, refers to the case of *Warren* v. *Mower*, 11 Vermont, 385, as an authority in support of its conclusion in this respect. But an examination of that case will show that the question here

or his broker continuously. Sales were made of 3,000 shares, April 7th and 8th, resulting in a loss of $33,322.10 from the purchase price of the 3,000 shares first purchased, for which sum, with interest, the reference directed judgment in favor of plaintiff, which was entered accordingly.

THOMAS ALLISON, for the appellant.

The intention of the parties at the time the guaranty was given must govern its construction: *Rindge* v. *Judson*, 24 N. Y. 64; *Agawam Bk.* v. *Strever*, 18 Id. 502. Plaintiff, in order to recover, was not bound to identify any specific shares; he need only show that he at all times held the number mentioned in the contract: *Horton* v. *Morgan*, 19 N. Y. 170; 6 Duer, 56, 61; *Markham* v. *Jaudon*, 41 N. Y. 235, 243; *Nourse* v. *Prime*, 4 Johns. Ch. 490; 7 Id. 69; *Allen* v. *Dykers*, 3 Hill, 593, 598.

HIRAM A. JOHNSON, for the respondent.

By mingling the shares in question with others, so as to render their identification impossible, plaintiff rescinded the contract and relieved defendant of all liability: *Goodrich* v. *Lafflin*, 1 Pick. 57; *Frost* v. *Clarkson*, 7 Cow. 24; 16 Mass. 161; 1 J. Cas. 116.

ALLEN, J.

The contract, which is the foundation of the present action, is novel in its character, and may be said to be *sui generis*. It is, in form, an undertaking by the defendant without other than a technical consideration to indemnify the plaintiff against loss from his own acts and dealings in a transaction undertaken for his own benefit, and in which the defendant had no interest and could derive no benefit. Perhaps the rule of construction of the instrument should be the same as in other cases of guaranty; that is, a fair and reasonable interpretation, according to the true import of its terms. When one engages to a third person for the debt of another, there is no reason for giving it an expanded signification or liberal construction beyond the language employed. It should not be extended by construction so as to include transactions not within the mani-

fest intention of the parties: *Douglass* v. *Reynolds*, 7 Peters, 113; *McCluskey* v. *Cromwell*, 11 N. Y. 598; *Gates* v. *McKee*, 13 Id. 234. No more stringent rule should be applied to a contract of indemnity to one in respect of his own acts and contracts. The clear meaning of the agreement, construed most liberally in favor of the plaintiff and against the defendant, the guarantor, is that the plaintiff should be indemnified against loss upon a single and isolated transaction—a buying and selling of 3,000 shares of a specified stock. A continuous transaction or repeated buying and selling of this stock was not within the terms of the instrument. It was not in the contemplation of the parties that the plaintiff should engage and continue in unlimited speculation in the stock named during the time mentioned in the agreement, and that the defendant should be answerable for the result of the speculation to the extent of the difference between the cost of the 3,000 shares purchased simultaneously with making the agreement, and the selling price of the last 3,000 shares sold, or any 3,000 shares that the plaintiff might sell in the course of his dealings. Such was the effect given to the engagement of the defendant by the referee. The 3,000 shares purchased by the plaintiff on the 24th of December, 1866, and which were the occasion and the subject of the guaranty, were mingled by the plaintiff and his brokers with many thousands of other shares, which were bought and sold by and for account of the plaintiff, and its identity lost. The liability and risk of the guarantor were essentially varied by this mode of dealing by the plaintiff without his knowledge or assent. One might be willing to guarantee against loss upon a single transaction, who would shrink from responsibility to any amount based upon the result of a series of gambling adventures involving hundreds of thousands of dollars in Wall street. Had the plaintiff kept the 3,000 shares, the subject of the guaranty, distinct from his other operations, he might possibly have recovered, as his other ventures might not have released the defendant. But had he in such case sold those shares, the result of the guaranty would have been fixed by such sale. He could not have repurchased the same or other shares, and held the defendant as upon a continuing guaranty. It is conceded that no one can tell, and the referee has not found that the identical shares,

against loss upon which the plaintiff was indemnified by the defendant, were not sold at a profit within thirty days. If they were, the contract was at an end, and there was nothing to which the renewals entered into by the defendant, in ignorance of the facts, could attach. The defendant has undertaken for the result of a single transaction, and the plaintiff has so mingled the subject of the undertaking with very many other like transactions carried on simultaneously, that it is impossible to separate it from the others, and certainly show that there was a loss, and to hold the defendant under such circumstances, would be essentially to vary the contract made by him. The only importance of identifying the particular certificates representing the shares of stock, which were the subject of the guaranty, is that the stock and the particular venture has no other ear-mark by which it can be traced, and the result made to appear, and whether the plaintiff did or did not own or have control of 3,000 shares of this particular stock, during his entire course of speculation, ending, as is usual in such cases, in ruinous losses, is not material. At what time or for what prices he sold this particular stock, neither he nor his broker knew. He selects from all the accounts of his brokers a sale of 3,000 shares, in nearly a dozen different parcels on a given day, and elects to call those sales the closing out of the guaranteed stock. The shares then sold may have been purchased within a week of the sale, and sold at an actual profit. The evidence was not sufficient to charge the defendant.

The order granting a new trial must be affirmed, and the judgment absolute for the defendant.

All concur.

Order affirmed, and judgment accordingly.

CURRIER V. LEBANON SLATE CO.

(56 New Hampshire, 262. Superior Court, 1875.)

[1] **Insolvent corporation buying its own stock.** An insolvent corporation can not purchase a portion of its capital stock. Such a transaction would be in conflict with Gen. Stat. Ch. 135, Sec. 3. A corporation whose capital stock as fixed and limited has not been fully paid in, can not relieve a delinquent stockholder from payment of assessments upon his stock by a purchase of the same, especially against the objection of another stockholder.

A corporation can not reduce its capital stock, by purchasing the shares of any stockholder. In order that such reduction may operate justly to all the stockholders, each stockholder should be allowed to surrender such proportion of his stock as the amount of the proposed reduction bears to the whole amount of capital stock.

From the Grafton Circuit Court. In Equity.

Dorrance B. Currier, of Hanover, in behalf of himself and all other stockholders in the Lebanon Slate Company who may come in and join in the prosecution of this suit, complains against said company and Elisha P. Liscomb, of Lebanon, Joseph W. Cleveland, formerly of Lebanon, and Adna Storrs, of Hanover, and says that he is the owner of one hundred shares of the stock of the company, being one tenth of the whole number of shares; that the company was incorporated by the legislature of the State of New Hampshire, at the June session, 1866, with authority to carry on the business of mining slate, and other minerals of any description, in the towns of Lebanon and Hanover and their vicinity, and to prepare the same for the market, and with authority to fix the amount of capital stock, the par value of the shares, and adopt a code of by-laws; that the grantees organized under said charter, and, on October 12, 1866, voted that the capital stock of the corporation be fixed at one hundred thousand dollars, in one thousand shares of one hundred dollars each; that upon these one thousand shares of stock assessments were voted from time to time; that real estate was purchased, a dam built on Mascoma river in Lebanon, a mill erected for the

[1] *Coleman* v. *Columbia Oil Co.*, 3 M. R. 483.

manufacture of slate in its different forms and for its different purposes, excavations made, and quarrying carried on for getting out the slate, more or less of which was manufactured at the mill and there sold, or sent thence to market; that Liscomb has been the owner of five hundred shares of its capital stock; two hundred and fifty of said shares he owned on August 22, 1867; that on that date an assessment was voted by the company, upon each share of stock, of four dollars; that on October 4, 1867, two hundred and fifty shares of the capital stock were sold at public auction for the non-payment of the assessment of four dollars per share, and were struck off to Liscomb, he being the highest bidder, at one dollar per share; that the company, so far as the purposes for which it was set on foot were concerned, was not a success; that on November 19, 1868, the company passed a vote "to authorize the treasurer to hire money for the use of the company;" that on March 17, 1869, it was voted by the company "that the directors obtain three thousand dollars upon a permanent loan, in such sums as they may be able, and find necessary for the use of the company; and they are hereby authorized to pledge any personal or real estate and machinery, by deed or deeds of mortgage, to any person or institution as security for the same;" that on the same day and at the same meeting, it was "voted that the directors may give a note for one thousand dollars, payable in one year from date;" "also, another note for a like sum, after deducting what is due the company from Mr. Liscomb, on his transferring one hundred shares of his stock to the company;" that in pursuance of this vote, one hundred shares of the stock belonging to Liscomb were sold to the company at twenty dollars per share, and were transferred on the books of the company from Liscomb to the company, fifty shares on March 30, 1869, and fifty other shares on April 20, 1869; that said vote was carried through by the influence of Cleveland, acting for and on behalf of Liscomb, avowedly for the purpose of relieving him, who was, as stated by Cleveland, embarrassed by being obliged to carry so much of the stock of the company, and to pay the assessments on the same, and who was then owing the company eight hundred dollars or thereabouts for assessments theretofore laid upon his stock; that said vote was carried through as a personal favor to Liscomb, and not

with a view to any benefit or advantage to be derived by the company therefrom, but to relieve Liscomb from the burden of carrying so much of the capital stock of the company; that said Cleveland and Storrs were stockholders, and were present at said meeting, and voted in favor of said purchase; that the plaintiff opposed the proposition that the company should take said one hundred shares from Liscomb at any price, and, after strenuously objecting and protesting against taking or passing any such vote by the company, left the room where said meeting was held before the vote was taken to purchase said stock; and he objected on the ground that the company was in debt, and maintained that such a transaction was not only illegal, but unjust, and that he would resist and oppose it to the end; that the stock, at the time the above votes were passed, had no marketable value and could not have been sold; that for said one hundred shares two notes were given by said company to said Liscomb, one for one thousand dollars, now in his hands, and one for six hundred dollars or thereabouts, in the hands of said Storrs, who took it, being well aware at the time of all the circumstances attending the giving of the note, and the consideration therefor; by means of all which the plaintiff says he has been greatly damnified, as well as said Lebanon Slate Company, his property in said company being diminished greatly in value by the aforesaid purchase and transfer of stock from Liscomb to said company, and by the aforesaid notes held by Liscomb and Storrs, and now outstanding against the company; and the stock of the plaintiff, as well as the property of the company, will be still further depreciated if the payment of said notes should be enforced against the company.

The prayer of the bill is, that said stock may be decreed and ordered to be re-transferred to Liscomb, or to Liscomb and Storrs, and that the notes given therefor may be decreed null and void, and be canceled and given up; and, further, that said company may be enjoined from paying said notes; that said Liscomb, Cleveland, and Storrs be enjoined against negotiating or transferring said notes, and from attempting to collect the same, and ordering and commanding them to cancel and give up said notes upon the re-transfer or a tender of a re-transfer of said stock, and for other relief.

Storrs filed an answer, admitting that he was a stockholder in said company; that he was present at the meeting when it was voted to purchase said one hundred shares of said Liscomb, and authorize the officers to give the notes of the company therefor. He claims that it was a "legitimate transaction," and admits that a few weeks afterward he purchased of Liscomb the note for $600 in good faith, paying the full amount therefor, and that he still holds the same.

Liscomb, for himself, and as agent of the company answered, admitting that the company has not been a success; that, pursuant to said votes, the company purchased one hundred shares of his stock, but denied that it was done as a personal favor to him and not with a view to benefit the company, or that he was then owing the company $800 for assessments then due; or that the plaintiff objected to the purchase of said stock; or that the stock was of no marketable value and could not be sold; he averred that the known debts of the company did not at that time exceed $750, of which $500 was for plaster then in store; that at that time they owned one hundred acres of land, including one of the best waterpowers in the country, and a valuable mill and machinery, with prospects for a large and profitable business; that the prospects then were more favorable than ever before; that no stockholder would at that time have sold his stock at less than $20 per share, being the amount of assessments then paid in; that said Liscomb, being treasurer of the company, bid off two hundred and fifty shares of the stock, sold for non-payment of the first assessment of $4 per share, at $1 per share, for the benefit of the company, after consulting with some of the stockholders, paying the company $3 per share in addition to the price at which he bid them off, which was the full amount of the assessments to that date; that unless he had done this the company would have been embarrassed, as no outside parties appeared at the sale; that the vote, sale, and transfer of said one hundred shares to the company was in good faith, and for the interest of the company; that the plaintiff's interests were not lessened thereby; that the plaintiff made no objection to the sale and transfer, "save a certain amount of habitual grumbling;" that his stock did not depreciate nor the prospects of the company look unfavorable until some months afterward, when defects

in the quarry were discovered, and plastic slate as a roofing material proved a failure; and that at the time of the transfer said Liscomb was solvent.

Cleveland did not answer.

The cause was referred to a master, who reported that at the time the Lebanon Slate Company voted to purchase the one hundred shares of Liscomb's stock at $20 a share, there had been no sale of the stock in open market; and that no dividend had been declared; that at the time of the vote, Liscomb was owing the company something over one hundred dollars on assessments previously made on his stock; that the company was then indebted to various persons to the amount of about $800, also on a small note, amount not ascertained; that there appears also to have existed at that time, though unknown to the parties, a mistake of $1,000 in Liscomb's report, as treasurer in 1868, in favor of the company; that including this $1,000, the indebtedness of the company, March 17, 1869, was somewhere over $1,800. He also finds that at the meeting at which the vote was taken to purchase said one hundred shares of Liscomb's stock, Cleveland, who then had charge of the company's works, represented to the meeting that Mr. Liscomb had more stock than he was able to pay the assessments on, and wished the company to take a portion of his stock, and give him notes for the same, at $20 a share; Cleveland also represented that unless Mr. Liscomb could have some relief he would be unable to pay his assessments, and that the company would be obliged to stop their works or hire money to carry them on; he also represented that Liscomb would then be enabled to raise money on the notes he would receive from the company to pay the assessments on his remaining stock. At the meeting of the company, March 17, 1869, the plaintiff objected to the company's purchasing the one hundred shares of Liscomb's stock; that at the time of the vote to purchase the one hundred shares of Liscomb, the market for concrete had failed, and that for ground slate began to fail materially in the spring of 1869; but it did not appear whether it was before or after the time of the vote, March 17, 1869. In other respects the affairs of the company were as prosperous, apparently, as they had been.

The master finds that there were observed seams of quartz

running across the face of the ledge from the beginning of the operations of the company, or as early as July, 1868, and that there was more in sight then than in the fall of 1868, when the quarry presented nearly a perpendicular face about thirty feet high, and from twenty to thirty feet in breadth. One vein of quartz ran through it about four inches thick, nearly on the upper edge of this face, across the grain of the slate; they also ran upon a bed seam at the bottom of the excavation; there were also two seams running across the grain nearly at right angles to the quartz vein. In the fall of 1868 the slate was not as good as it had been, but the company expected it would improve as they went in. From January to June, 1869, the company were engaged in grinding slate and plaster, getting out flagging, manufacturing, to some extent, sinks, waterboxes and gravestones, and marbleizing slate. In April they put in a rubber bed and drill machine, at an expense of about $1,000. In June they came to a hard and warped material in the quarry that had apparently been heated, and the slate being thus unsuitable for marbleizing, they suspended work at the quarry. In all these months they shipped ground slate, barreling it up and sending it off.

The master finds that of the articles manufactured by the company, the market for ground slate began to fail materially in the spring of 1869, and that the market for concrete failed in the fall before, and the marbleizing of slate failed, on account of the discovery of the hard and warped condition of the slate in the quarry, in June, 1869.

The master finds that the reasons why the company is not now in operation are, that the quarry failed to produce a good article of slate, the failure being especially manifest in June, 1869; and the losing the sale of ground slate by the failure of the plastic roof slating, for which it was extensively used. There was a concrete for which a patent was taken out, and the use of this failed also. The company also lost the sale of ground slate for oil-cloth, for which it was extensively used, by the substitution of another article.

He finds that Liscomb, upon the sale of the personal property of the company, received between $4,000 and $5,000, and paid it out for the liabilities of the company; and that Liscomb testified that he did not think that he had paid out any-

thing on liabilities against the company existing prior to March 17, 1869.

He finds that the accounts of the company were kept very imperfectly; that neither Liscomb nor Cleveland can give an exact account of the company's indebtedness March 17, 1869, or of what it now owes.

There was evidence showing that at the meeting of the company March 17, 1869, Cleveland reported that Liscomb was owing the company $800, or thereabouts, and could not carry as much stock as he then had.

Since March 17, 1869, a claim is made against the company by Liscomb for money advanced in the fall of 1867, to pay for stock sold to pay assessments. He bid off the stock—two hundred and fifty shares—at $1 per share, and paid the assessments, $3 per share, thus creating a debt of $1,000 against the company, as now claimed. The real estate of the company has been in the market since 1870, at $4,500. There has been no final settlement of the affairs of the company.

The master finds that neither Cleveland nor Liscomb, whether acting as general manager, or agent, or clerk, or treasurer, can give an exact or accurate account of the business of the company.

The questions arising on the master's report were transferred to this court by LADD, J.

DUNCAN (with whom was H. BINGHAM), for the plaintiff.

SPRING, for the defendants.

SMITH, J.

1. The vote of March 17, 1869, authorizing the directors to give the notes of the corporation to the amount of $2,000, upon receiving from Liscomb a transfer of one hundred shares of his stock, was in effect a vote to release him from his subscription for so many shares, and to refund to him the amount he had paid thereon. The reason assigned to the stockholders why this should be done was, that he had more stock than he was able to pay for, and, unless he could have relief in some way, the company would be obliged to stop their works or hire money to carry them on. It was

further represented that he would thus be enabled to raise money on the notes of the company with which to pay the assessments on his remaining stock. It is not claimed by the defendants that the corporation intended, or that the effect of the note was, to reduce the amount of the capital stock, or to extinguish the one hundred shares transferred by Liscomb; but they claim that the corporation hold the shares so transferred as property, with power to reissue the same to any subscriber or purchaser thereof.

It distinctly appears that the whole amount of the capital stock, as fixed and limited by the corporation, has never been paid in. It is certain, therefore, that prior to March 17, 1869, the directors and treasurer could not make and subscribe a certificate under oath that the amount of the capital stock had been fully paid in, and cause the same to be recorded in the office of the clerk of the town where the corporation had its principal place of business, as required by chapter 135, section 20, General Statutes. Under section 8 of the same chapter, therefore, the stockholders were individually liable for all the debts and contracts of the corporation.

It is not distinctly found in the master's report whether the corporation, on March 17, 1869, had sufficient assets to meet all its liabilities. If it had not, the vote in question would be clearily illegal, and what has been done under it should be set aside. The funds of an insolvent corporation can not be taken to buy in a portion of its capital stock at the expense of its remaining stockholders. It would be grossly inequitable to the other stockholders, and a fraud upon the creditors. Moreover, it is prohibited by Ch. 135, Sec. 3, Gen. Stats., which provides that no dividend shall be made, and no part of the capital stock shall be withdrawn or refunded to any of the stockholders, when the property of the corporation is insufficient, or will be thereby rendered insufficient, for the payment of all its debts; and by section 7 it is provided that any stockholder who shall receive any sum unlawfully withdrawn or refunded from the capital stock, shall, to the amount by him received, be individually liable for all the debts of the corporation then existing, or afterward contracted, until the same is repaid, or paid to the creditors of the corporation.

2. But, assuming that this corporation, on March 17,

1869, was solvent, it becomes material to inquire whether the corporation could lawfully purchase of Liscomb one hundred shares of its capital stock, the assessments upon which he had been unable to meet.

In *Salem Mill Dam Corporation* v. *Ropes*, 6 Pick. 23, it is laid down that "no vote or act of a corporation can enlarge its chartered authority, either as to the subjects on which it is intended to operate, or the persons or property of the corporators. If created with a fund limited by the act, it can not enlarge or diminish that fund but by license from the legislature, and if the capital stock is parceled out into a fixed number of shares, this number can not be changed by the corporation itself: *Vide*, 1 Dane's Abr., Ch. 22, Art. 1, and the numerous authorities cited by the author."

In *City Bank* v. *Bruce*, 17 N. Y. 507, it appears that the Columbus Insurance Company, being in full operation, with a capital of $300,000 (the amount authorized by its charter), voted, through its board of directors, that any stockholder indebted to the company on stock notes might have the privilege of paying any part or all of such indebtedness in the capital stock of the company, at a rate specified in the resolution. Under this authority stock was surrendered or transferred to the company in payment of notes, to the amount of $133,000. Selden, J., in delivering the opinion of the court says: "There seems to be no ground for questioning the validity of this transaction. I am not aware of any common-law principle which forbids it, nor is it shown to have been in contravention of any provision of the charter of the company, or any other of the statutes of Ohio. In the case of *Taylor* v. *The Miami Exporting Co.*, 6 Ohio, 176, it was held that a bank might receive its own stock in payment of a debt, and might hold it as it did its other corporate property."

I am not prepared to say that under the laws of this State a solvent corporation may not, in good faith, and for the purpose of securing payment of a debt against a stockholder which might not otherwise be collected without risk, delay and expense, receive its own stock in payment therefor at its fair value, and hold the same as property; in which case it would not become extinguished, and might be reissued to the purchaser thereof. But this case differs widely from such a

case. The object of the vote in question appears to have been, or was declared to be, not to collect a debt due to the corporation, but to afford relief to a stockholder by taking off his hands stock for which he had partially paid, but for which he was unable to complete the payments. This was done by hiring money for the purpose, or rather by giving the notes of the corporation to be negotiated by him, and ultimately paid by the company, and against the protest of the plaintiff. It is difficult to see how the welfare of the corporation could be promoted by hiring money, or incurring further liabilities, to purchase in one tenth of its capital stock, for which there had been no sale in the open market, and upon which no dividend had ever been declared, and for which it was extremely doubtful whether another purchaser could be found, unless the affairs of the company should improve (a condition which appearances then hardly warranted). The inevitable result was to release Liscomb from paying into the treasury of the company the balance of the assessments then made, or to which the stock was liable, amounting to $8,000.

It further appears from the report of the master that two hundred and fifty shares of stock were sold by the company for non-payment of an assessment. The defendant, Liscomb, admits that he bid this off at $1 per share, and paid to the company the balance of the assessment, $3. He says this was done after consulting some of the stockholders, but he does not claim that he had any legal authority to buy it for the company. The reason that he assigns, that unless he had done this the company would have been embarrassed, as no outside parties were present at the sale, shows that the stock had little if any value at the time. By the report of the master it also appears that Liscomb has, since March 17, 1869, claimed to recover the sum of $1,000 so paid by him. It is not material to inquire upon what ground such a claim can be based. That question does not arise here, and the transaction is important only as bearing on the value of the stock, and the value of the stock is material as bearing on the good faith with the purchase by the company of the one hundred shares, October 17, 1869, was made.

If Liscomb was unable or unwilling to pay the assessments levied upon his stock, the statute afforded a remedy which

the corporation was bound to pursue. A suit could undoubtedly have been maintained against him to collect the assessments; or under Secs. 16 and 17 of Ch. 134, Gen. Stats, the treasurer could proceed to advertise and sell the shares, or so many of them as might be necessary to pay the assessments then due, with necessary charges. If the stock had any value, it is fair to presume it would have sold for what it was worth, or for a price approximating to it. If the transaction by which the company bought one hundred shares of its stock at $20 per share, was an honest transaction, the stock if sold in market would undoubtedly have brought that sum, or somewhere near it. If it would not, it affords very strong evidence of collusion between Liscomb and a majority of the stockholders, by which this plaintiff can not be bound, especially in the face of his protest seasonably made.

The plaintiff charges such constructive fraud as courts of equity recognize, and for which they set aside engagements. The action of the company relieved Mr. Liscomb from his contract to pay the over-due assessments upon one hundred shares of stock, but it involved the company in a further debt of $2,000 for one hundred shares of stock for which the company had no use, and which, it is fair to presume, others would have bought if they had possessed any value. The assets of the company were thus withdrawn and appropriated to an unlawful purpose, and at the same time the indebtedness of the company was increased. All this was done at the expense of the other stockholders, without the consent of the plaintiff and against his protest. It seems clear to me that he has the right to call upon the court to interfere and prevent this wrong, and to restore matters, as far as may be done, to the condition in which they stood at that time.

3. By section 3 of the charter of this corporation, the shareholders were authorized to fix the amount of the capital stock, not exceeding $200,000, and the par value of the shares. Accordingly, at the meeting of October 12, 1866, the capital was fixed at $100,000 in one thousand shares of $100 each. Did the action of the meeting of March 17, 1869, have the effect to reduce the capital stock as thus fixed and determined, and had the corporation power to reduce the capital stock in the manner then adopted?

By Gen. Stats., Ch. 134, Sec. 6, it is provided that a "cor| o.

ration, at any meeting called for the purpose, may increase or reduce its capital stock and the number of shares therein; but the capital stock, when so increased, shall not exceed the amount authorized by law." This section purports to be a re-enactment of section 9, chapter 141, Revised Statutes, which reads thus: "Every such company may, at any meeting called for that purpose, increase its capital stock and the number of shares therein, provided that the stock when so increased shall not exceed the amount authorized by law." It will thus be observed that the power of a corporation to reduce its capital stock, as found in the General Statutes, is new. Section 7 of the same chapter (which is a re-enactment of the statute of 1855), provides that a corporation may, by unanimous vote, or by the written consent of all the stockholders filed with the clerk, increase or diminish the number of its shares, and thereby increase or diminish the par value of its shares; but the capital stock shall not thereby be increased or diminished. At first view these two sections seem to be in conflict; but upon closer inspection it is apparent that the 7th section was intended to provide a mode by which the par value of shares may be diminished or increased, as a matter of convenience merely, without changing the amount of the capital stock; while the 6th section provides for increasing or diminishing the amount of the capital stock, as previously fixed and determined by the charter of the corporation or by vote of its members, whenever the circumstances or wants of the company may require a larger or smaller capital for carrying on its works profitably. If the corporation desires to increase its capital, this may be done by the issue of new shares, or by increasing the par value of the old. If it desires to diminish its capital stock, that may be done by refunding to its stockholders a definite portion of each share, or by the surrender and extinguishment of the requisite number of shares. But how this shall be accomplished when none are willing to surrender, or when all are anxious to surrender, it is not easy to determine. It can not certainly be at the expense and against the consent of one portion of the stockholders, and for the benefit and advantage of the others. The statute ought not to be construed to work other than exact and even justice to all the share owners. In *Bank* v. *Bruce* it was held that whether a purchase by a corporation of its own stock operates to diminish

the capital stock, is a question of intention; and this may be inferred from circumstances. In this case, as I understand the position of the defendants, it is not claimed that the stock purchased by the corporation of Liscomb has been extinguished, but is held to be reissued whenever a purchaser for it can be obtained. However this may be, I do not think a corporation has the power, under chapter 134, section 6, to diminish its capital stock by the purchase and extinguishment of a portion of its shares, without the consent and against the protest of any of its stockholders, when such purchase and extinguishment would operate for the relief and benefit of the stockholders from whom the stock is purchased, and will increase the liability of the remaining stockholders. Unless a course is adopted which will work exact and even justice to all the owners of stock, it must follow that so much of section 6 as authorizes a corporation to diminish its capital stock by the purchase and extinguishment of a portion of its shares, is inoperative. Probably a vote allowing each stockholder to surrender such proportion of the shares owned by him as the amount of the proposed reduction in the capital stock bears to the whole amount of capital stock, would not be open to objection, but would be a compliance with the requirements of the statute. But that was not the course pursued here. My conclusion, then, is, that the action of the company March 17, 1869, could not operate to diminish its capital stock.

The evidence shows that Adna Storrs was present at the meeting held March 17, 1869, and therefore knew the illegal nature of the consideration of the note for $600 transferred to him by Liscomb. A decree should be entered in the circuit court that Liscomb and Storrs be enjoined from collecting or negotiating the note for $1,000 and the note for $600; that they refund to the corporation all moneys received from the corporation, by either of them, on said notes, with interest from the time of such payments; that the company reconvey to Liscomb said one hundred shares of stock, and that the contract, by which Liscomb was released from payment of any sum or sums due from him to the company at the date of the purchase of said stock by said company, be annulled and set aside.

CUSHING, C. J., and LADD, J., concurred.

Decree accordingly.

DOUSMAN v. THE WISCONSIN AND LAKE SUPERIOR MINING AND SMELTING CO.

(40 Wisconsin, 418. Supreme Court, 1876.)

Power in equity to compel issue of stock. Where the board of directors of a corporation, in issuing new stock to the stockholders generally, refuse to issue to a particular stockholder his due proportion of such new stock, he may compel its issue to him by suit in equity against the corporation, there being sufficient of such stock undisposed of, notwithstanding his remedy at law for damages.

Suits to compel issue of stock must be several. Suits by stockholders to compel the issue of stock to them, their interests being several, can not be prosecuted in the name of one on behalf of himself and others.

Judgment not following prayer. Where the complaint in a suit to compel the issuing of certain shares of new stock to plaintiff, alleged that the new issue of stock had been actually made to the shareholders generally, and prayed for a corresponding issue to the plaintiff, and the judgment, instead of following the prayer, restrains the corporation from issuing any more new stock unless it shall issue a proportionate amount to the plaintiff, such variance will not justify a reversal.

Appeal from the Circuit Court of Milwaukee County.

The complaint alleges, in substance, that the plaintiff is owner of seven fully paid shares of defendant's capital stock, each representing five hundred dollars; that said stock numbered one hundred and thirty-one shares of like amount, on none of which except plaintiff's and one other share had there been paid in exceeding fifty per cent.; that at a meeting of the board of directors, it was resolved that thereafter defendant's capital stock should consist of one thousand shares of one hundred dollars each, and that of these, after depositing two hundred and fifty shares for delivery upon a contract with another corporation, five shares should be issued for each share of old stock to the respective owners of the latter, and the remaining ninety-five shares kept in reserve, to be thereafter disposed of as the board might direct; that the said board had accordingly issued almost all of said new stock, delivering

to each holder of a share of old stock, five shares fully paid of the new; and that plaintiff had frequently requested the defendants to issue to him his equitable proportion of the new stock, to wit, ten shares of new for each one of the old held by him, but the latter had refused to do so or to allow him any greater interest for his fully paid stock than was allowed to other stockholders for theirs on which fifty per cent. only had been paid. Prayer, that defendant be required either to issue to plaintiff new stock in the proportion stated, or to cancel one half the stock and certificates of the same theretofore delivered to other stockholders.

The answer alleged that plaintiff was the owner of lands supposed to contain valuable minerals; that defendant was organized for mining purposes; that the former desiring to participate in the profits of the latter, exchanged his lands for its capital stock; that it was the intention of the stockholders, and so understood by plaintiff at the time of the exchange, to make no assessments on its stock after certain lands which it designed purchasing were fully paid for, and then to put all the stock, including plaintiff's, upon the same footing; and that accordingly plaintiff's stock was issued subject to no assessments, but that it was not fully paid stock, only thirty-five per cent., as with the other stock at that time, having been paid in thereon. It was also alleged, and so shown in the proofs, that only a small portion of the new stock had been issued in exchange for the old.

The finding of facts except in the particular last mentioned, sustained the allegations of the complainant; and judgment was thereupon entered in favor of the plaintiff, restraining defendant from crediting or in any way treating any of the stock as fully paid except the eight shares specified in the complaint, and further directing that it forever "refrain from issuing to the holders of any of the stock of said corporation (except said eight shares), in exchange for the stock now held by them respectively, fully paid stock or stock purporting to be fully paid, or certificates thereof, of equal amount, or any amount exceeding one half the face of the stock so exchanged, unless it issue to said plaintiff an increased amount of fully paid stock in the same proportion upon the par value of the stock now held by him."

From this judgment the defendant appealed.

FINCHES, LYNDE & MILLER, for the appellant.

JENKINS, ELLIOT & WINKLER, for the respondent.

RYAN, C. J.

I. The injury which the respondent, as a shareholder of the appellant, sets up in his complaint, is one peculiar and personal to himself, not common to other shareholders, alleged to have been committed by the board of directors as the governing body of the corporation—that is, by the corporation itself. Clearly his remedy is against the corporation. Probably he might have maintained an action at law against it: *Gray* v. *Portland Bank*, 3 Mass. 364. But the effect of such an action would be to convert part of his interest as a shareholder into a judgment for damages; in other words, to sell a portion of his stock to the corporation. That he is not obliged to do. He has a right to maintain his proportionate interest in the corporation, certainly as long as there is sufficient stock remaining undisposed of by the corporation. Trading corporations of the character of the appellant have been likened to partnerships, and the remedies of stockholders to those of partners, by very high authority: *Gray* v. *Portland Bank*, *supra*; *Robinson* v. *Smith*, 3 Paige, 222; *Adley* v. *Whitstable Co.*, 17 Vesey, 315. And equity has always afforded a remedy to a stockholder, in such a case as this, by injunction, account or other appropriate decree: *Adley* v. *Whitstable Co.*, *supra*. This principle has been repeatedly recognized in this court, as in *Putnam* v. *Sweet*, 2 Pin. 302; *Nazro* v. *Ins. Co.*, 14 Wis. 319.

Such a case is clearly distinguishable from suits by stockholders in the right of the corporation, founded on wrongs against the corporation. In that class of cases, as the authorities cited by the appellant show, the right of suit is primarily in the corporation itself; and stockholders take the right, in lieu of the corporation, only upon refusal of the governing body of the corporation to sue.

Here the wrong complained of is by the corporation, not against it. The right is against it, not against individual directors. The judgment, to be effectual, must be against the cor-

poration itself; not against the directors personally, who may be changed from time to time. And even where a suit would lie by a corporation against its governing body, for wrongs done against it by the governing body, it is sufficiently manifest that a demand upon the governing body to bring the suit would be nugatory.

II. If there are other shareholders in like condition as the respondent, their right and his are several; they may bring their separate suits, or they may submit to the wrong, at their several pleasure. The respondent has no right to represent them. The case is entirely distinguishable from a wrong done by the governing body, common to all the stockholders.

III. The complaint assumed that the new issue of full paid stock for half paid stock had been actually made, and therefore prayed for the correspondng issue to the respondent. It appears by the finding of the court below, that this had been done only to "a small amount." And the judgment, instead of following the prayer of the complaint, restrains the appellant from issuing any more full paid for half paid stock, unless it issue a proportionate amount to the appellant. This is, in effect, an alternative judgment, of somewhat awkward form. There is no bill of exceptions; but we attribute the peculiar nature of the judgment to the embarrassment of the case by *the small amount* of full paid, actually issued for half paid stock. Certainly, in the absence of objections to evidence on the trial, of which we know nothing, the respondent would not be limited to the very form of relief which he prayed under a misapprehension of the facts: Sec. 29, Ch. 132, R. S. And we can not see that the peculiar form of the judgment does any injustice to the appellant. It leaves it in the discretion of the corporate body to recede from, or carry out, the proposed new issue of stock. It is more favorable to it than a single and positive judgment, either way.

The criticism made by the learned counsel for the appellant upon the language of the judgment for the contingent issue of new stock to the respondent, was singularly acute and ingenious. But such hypercriticism can not avail against a pleading or a judgment: *Winans* v. *Ins. Co.*, 38 Wis. 342. The legal effect of the judgment is, either to carry out in full and toward all stockholders the proposed new issues of stock, or

to refrain from it wholly and toward all the stockholders; and in the former course, to issue the proper amount of full paid stock to the respondent, so as to make his stock bear the same proportion to the new stock that it did to the old.

BY THE COURT. — *The judgment of the court below is affirmed.*

SHARP v. DAWES.

(L. R., 2 Q. B. Div. 26. Court of Appeal, 1876.)

[1] **A single shareholder can not constitute a meeting of a company under the Stannaries Act.**

Appeal from an order of the Queen's Bench Division making absolute an order to increase the amount of a verdict for the plaintiff.

At the trial it appeared that the Great Caradon Mine was a mining company in Cornwall carrying on business on the cost book system. The company had offices in London, and on the 22d of December, 1874, a notice was duly given that a general quarterly meeting of the shareholders would be held on the 30th of December at the London offices for the purpose of passing the accounts, making a call, receiving a report from the agent, and transacting any ordinary business of the company.

The only persons who attended at the time appointed for the meeting were the secretary, G. Sharp, and one shareholder, R. H. Silversides, who held twenty-five shares. A circular was then sent to the shareholders, with the accounts and the following notice:

At a general meeting of the shareholders, held at 2, Gresham Buildings, Basinghall street, London, E. C., on Wednesday, the 30th day of December, 1874, pursuant to notice, R. H. Silversides, Esq., in the chair. The notice convening the meeting having been read, the minutes of the last meeting were confirmed.

The financial statement, ending the 28th of November,

[1] *Ricketts* v. *Unangst*, 15 Pa. St. 90; 53 Am. Dec. 572.

showing a balance of £83 11*s.* 5*d.* against the shareholders, having been read, it was

Resolved, "That the same be received and passed."

Captain William Taylor's report having been read, it was

Resolved, "That the same be received and passed, and, together with the financial statement, be printed and circulated among the shareholders."

Resolved, "That a call of 4*s.* 6*d.* per share be now and is hereby made payable to the secretary, and that a discount of 5 per cent. be allowed if paid by the 20th of January, 1875."

Resolved, "In consequence of the death of Lieut.-Col. W. T. Nicolls, and until the appointment of a shareholder to act in his stead, that all cheques be signed by Mr. R. H. Silversides and Mr. Granville Sharp jointly."

(Signed) R. H. SILVERSIDES, Chairman.

Resolved, "That a vote of thanks be given to the chairman."

(Signed) GRANVILLE SHARP, Secretary.

There was no rule of the company varying the requirements of the Stannaries Act, 32 & 33 Vict. c. 19. By rule 4,—

The secretary shall call a general meeting of the shareholders once in every three calendar months, to be held at such time and place as shall be appointed by the committee of management.

The defendant, one of the shareholders, refused to pay this call, and the action was brought against him, in the name of the secretary, for the amounts due on a previous call and on this call.

Judgment was given for the plaintiff for the amount due on the previous call, with leave to move to increase it by the amount due on the second call.

The plaintiff accordingly moved before BLACKBURN and QUAIN, JJ., who made the rule absolute.

HOLL, for the defendant.

J. BROWN, Q. C., and LANE, for the plaintiff.

LORD COLERIDGE, C. J.

This is an attempt to enforce against the defendant a call purporting to have been made under § 10 of the Stannaries Act, 1869. Of course it can not be enforced unless it was duly made within the act. Now, the act says that a call may be made at a meeting of a company with special notice, and we must ascertain what, within the meaning of the act, is a meeting, and whether one person alone can constitute such a meeting. It is said that the requirements of the act are satisfied by a single shareholder going to the place appointed and professing to pass resolutions. The 6th and 7th sections of the act show conclusively that there must be more than one person present; and the word "meeting" *prima facie*, means a coming together of more than one person. It is, of course, possible to show that the word "meeting" has a meaning different from the ordinary meaning, but there is nothing here to show this to be the case. It appears therefore, to me, that this call was not made at a meeting of the company within the meaning of the act.

The order of the court below must be reversed.

MELLISH, L. J.—In this case, no doubt, a meeting was duly summoned, but only one shareholder attended. It is clear that, according to the ordinary use of the English language, a meeting could no more be constituted by one person than a meeting could have been constituted if no shareholder at all had attended. No business could be done at such a meeting, and the call is invalid.

BRETT and AMPHLETT, JJ.A., concurred.

Judgment for the defendant.

MORRISON v. THE GOLD MOUNTAIN GOLD MINING CO.

(52 California, 306. Supreme Court, 1877.)

[1] **Contract of corporation before incorporation.** An agreement by the owners of a mine among themselves that a third party is entitled to 2,500 shares of the stock of a corporation which they are about to organize, on the payment by him of his *pro rata* of the purchase money paid

[1] *Hawkins* v. *Mansfield Co.*, 13 M. R. 581; *Penn Match Co.* v. *Hapgood*, 141 Mass. 145.

for the mine, and of the expenses in working, is not the agreement of the corporation subsequently organized.

A person who has not the legal title to the stock of a corporation can not maintain an action against the company for converting it.

Conversion of shares of stock by corporation. An order of the president of a corporation drawn upon himself as president to transfer to a person a certain number of shares of stock of the corporation, followed by the refusal of himself and the secretary to deliver the stock, does not amount to a conversion of the stock by the corporation.

Appeal from the District Court, Third Judicial District, City and County of San Francisco.

Action to recover damages for the alleged conversion by the defendant of two thousand five hundred shares of its stock. In November, 1873, E. J. Baldwin acquired, by purchase from the locators, a gold-bearing ledge in San Bernardino county. He and other parties afterward formed the corporation, the defendant here, for the purpose of working the ledge, with a capital stock of sixty thousand shares. While engaged in forming the corporation, but before it was formed, the parties in interest agreed among themselves that the plaintiff was entitled to two thousand five hundred shares of the stock on paying his *pro rata* of the purchase money paid for the mine and of the expenses in working. E. J. Baldwin was elected president of the corporation, and J. P. Cavallier its secretary. On the 21st of February, 1874, Baldwin delivered to the plaintiff the following order:

"To E. J. BALDWIN, President of the Gold Mountain Mining Co.: Please transfer to W. P. Morrison, or order, twenty-five hundred shares of the Gold Mountain Gold Mining Company stock, said W. P. Morrison to pay his *pro rata* of purchase money paid for the mine, and also his *pro rata* of all expenses for working the mine to the date of delivery of the stock.

"San Francisco, Feb. 21st, 1874.

"E. J. BALDWIN,

"President of the Gold Mountain Gold Mining Co.

"Witnesses: J. P. Cavallier, S. H. Baird."

On the last of February, 1874, the plaintiff called at the office of the corporation, and offered to pay his *pro rata* of the purchase money and expense of working, and demanded from the president and secretary the stock, and at the same time presented the above order. They refused to receive the money

or deliver the stock. On the 21st of April, 1873, the corporation had issued said twenty-five hundred shares of stock to E. J. Baldwin, trustee. The court rendered judgment for the plaintiff, and the defendant appealed.

SOL. A. SHARP, for the appellant.

The corporation had no power to transfer the stock named in the order; nor had Baldwin, as president, or otherwise, power to bind the company by any such order, or to impose upon the corporation the necessity of keeping his private accounts, as required by the order. The plaintiff has misconceived his action. Baldwin, if any one, is liable to him: *Taft* v. *Brewster*, 9 Johns. 333; to the same effect, *Stone* v. *Wood*, 7 Cowen, 452; *Hills* v. *Bannister*, 8 Cowen, 32; *White* v. *Skinner*, 13 Johns. 307. The president of a corporation is not *ex officio* the agent of the corporation to sell property; and unless appointed by the agent to sell, his representations are not binding on the corporation: *Crump* v. *U. S. Mining Co.*, 7 Grat. 352. The *company*, by common consent of all parties originally interested, rightfully issued all the original shares of the capital stock to E. J. Baldwin, trustee (not president), who held a personal lien upon each of said shares for its proportion of the original cost of the mine, necessary expenses, interest, etc. The company, in law, had a discretion and a right to determine to whom the original shares should be issued, and if any shares were issued wrongfully the parties injured should have pursued the stock. The corporation having issued all the shares of capital stock, were powerless to issue any more. The plaintiff's remedy—if any he had—was clearly against Baldwin, or else to have pursued the stock. The case of the *Mechanics' Bank* v. *N. Y. R. R.*, 13 N. Y. 600, is decisive of both the first and second. The stock was rightfully issued to Baldwin as trustee, and therefore there was no conversion by the corporation. The plaintiff must pursue the stock.

T. L. M. CHIPLEY, for the respondent.

If the company had a right to issue its stock to Baldwin, it must be responsible to parties injured by it without their consent. And if all the stock of the company had been issued,

then it should have canceled twenty-five hundred shares of the interest of plaintiff, which had been issued to Baldwin, and reissue the same to plaintiff. The president and secretary undoubtedly had authority to do this, and as they refused to do so, the company is responsible, as it would have been had they not given them authority to do so, because the law gives them that authority, and the corporation, by incorporating under the law, renders itself amenable to it.

BY THE COURT.

1. The agreement "by the parties in interest" that the plaintiff should be entitled to two thousand five hundred shares of the stock of the company, was not the agreement of the corporation sued as defendant here, for the corporation at that time had no existence.

2. It does not appear that the plaintiff had the legal title to the stock mentioned in the complaint.

3. It does not appear that the corporation converted the stock in controversy. The order of Baldwin, as "president of the corporation," drawn upon himself as "president of the corporation," followed by a refusal upon his part and upon that of the secretary to deliver the stock, would not amount to a conversion of the stock by the corporation.

Judgment and order denying a new trial reversed, and cause remanded.

HAWKINS v. THE MANSFIELD GOLD MINING CO.

(52 California, 513. Supreme Court, 1877.)

[1] **Transfer of stock of corporation, before organization.** If the owners of a mining claim agree to incorporate and take stock in the corporation in proportion to the interest of each in the mine, and before the corporation has been created, one transfers to a third person shares of stock to be issued as soon as the corporation is in existence, and gives him a certificate to that effect, the corporation is not bound by the transfer or certificate, and is not obliged to issue the stock to such third person.

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[1] *Kelly* v. *Ruble*, 4 Pac. 593; *Reich* v. *Rebellion Co.*, 2 Id. 703; *Bailey* v. *Pittsburg Co.*, 3 M. R. 599; *Coyote Co.* v. *Ruble*, 4 Id. 88.

Appeal from the District Court, Third Judicial District, City and County of San Francisco.

Action to compel the defendant to deliver to the plaintiff certificates for fifteen hundred shares of its capital stock, or in case delivery could not be made, for its value. On the trial the plaintiff testified in his own behalf that in 1873 W. W. Higgins employed him to act in negotiating certain real estate transactions, which were closed about January 17, 1873, and in payment of his services agreed to give him fifteen hundred shares of the stock of the defendant when it was incorporated, and gave him two written orders for the same, reading as follows:

"SAN FRANCISCO, January 11, 1873.

"This is to certify that R. A. Hawkins, trustee, is entitled to one thousand shares in the Mansfield Mine, to be issued as soon as practicable after the same is incorporated.

"W. W. HIGGINS."

"This is to certify that R. A. Hawkins, trustee, is entitled to five hundred shares of the Mansfield Mining Company's stock, to be issued as soon as practicable after the incorporation.

"W. W. HIGGINS."

That after the mine was incorporated he demanded the stock, but the company refused to issue it. The secretary, at the request of the plaintiff, gave him the following statement:

"Mansfield Gold Mining Company, three thousand three hundred feet, ten shares to a foot, thirty-three thousand shares. At the time of the incorporation Mr. W. W. Higgins had one thousand feet or ten thousand shares, of which two thousand five hundred were set aside for working capital, leaving him seven thousand five hundred shares.

"WILLIAM SMALL, Secretary.

"March 27th, 1873."

It was admitted that when Higgins gave the certificates he owned an interest in the mine, which he afterward transferred to the defendant when it was incorporated. The plaintiff also swore that sales of stock had been made in the stock boards as high as seventeen dollars per share. The plaintiff rested and the defendant moved for a nonsuit, because the stock had

no existence at the time the transfer was made, and therefore the contract between the plaintiff and Higgins was void. The court denied the motion, and rendered judgment for the plaintiff. The defendant appealed from the judgment, and from an order denying a new trial.

S. D. WOODS, for the appellant.

The thing attempted to be conveyed was not in existence, therefore could not be transferred: Sec. 1722, Civil Code; *Lunar* v. *Thornton*, cited in Benjamin on Sales, 227–9; 2 Kent's Com. p. 469; 2 Esp. 639. The Code as it stood January 11, 1873, provided a way for dealing with non-existent property: Sec. 1730, Civil Code. The contract between Higgins and respondent must be construed under said section. It was a mere executory agreement, the remedy for a breach of which was an action for damages: Benjamin on Sales, p. 727; *Hale* v. *Rawson*, 4 C. B. N. S., Note 5, p. 85.

J. G. SEVERANCE, for the respondent.

Although, when Higgins transferred to respondent his interest in fifteen hundred shares of the stock, the incorporation may have been a mere possibility, yet was that possibility coupled with a then existing interest; and if we apply to Sec. 1045 of the Civil Code the rule "*exceptio firmat regulam in casibus non exceptis*," it was a valid transfer under Arts. I and II of Chap. 1 of Title IV, relating to transfers, of the same Code. "A man may as well make an agreement with another for certain stock in a corporation to be organized hereafter as an agreement for stock in a presently existing corporation." *Chater* v. *S. F. Sugar Refining Co.*, 19 Cal. 246. And the reasoning of that case will apply to agreements, sales and transfers alike.

BY THE COURT.

The facts, as testified to by the plaintiff himself, did not make a case in his favor, and the defendant's motion for a nonsuit should have been sustained. The certificate of Hig-

gins to the effect that the plaintiff is "entitled to one thousand shares in the Mansfield Mine, to be issued as soon as practicable after the same is incorporated," was not the act of the corporation, nor binding upon it; for at that time the corporation was not in existence, and the subsequent refusal of the secretary to issue stock thereon was not an act of conversion by the corporation.

The case is not distinguishable from that of *Morrison* v. *Gold Mountain Mining Co.*, 52 Cal. 306. (*Ante*, page 578.)

Judgment and order reversed, and cause remanded.

CAMERON ET AL. V. SEAMAN ET AL.

(69 New York, 396; 25 Amer. R. 212. Court of Appeals, 1877.)

Personal liability of trustee—Proof of acceptance of trust. The mere election of a trustee, under the general act for the formation of manufacturing and mining companies, does not render him liable for the debts of the corporation because of a failure to comply with the law; there must be evidence of an express or implied acceptance of the office.

Annual report—Filing of, after set period. Under the act requiring the company annually, within twenty days from the first of January, to make a report, which shall be signed, verified, filed and published, the filing and publishing may be done after the twenty days have elapsed. (FOLGER and RAPALLO, JJ., dissenting.)

Publication in newspaper nearest to place of business. Under the provisions of an act requiring the publication of an annual report, "in some newspaper published nearest the place where the business of the company is carried on," if there is no newspaper in the town where the mines of the company are located, a publication in the newspaper nearest to such town, is a compliance with the statute, whether it be nearest the company mines situate in the town or not.

Appeal from judgment of the General Term of the Supreme Court in the second judicial department affirming a judgment in favor of plaintiffs, entered upon a decision of the court on trial without a jury. (Reported below, 7 Hun, 601.)

This action was brought by plaintiffs as creditors of the Shenandoah Mining Company, a corporation organized under the general manufacturing act (Chap. 40 Laws of 1848) against

[1] *Butler* v. *Smalley*, 101 N. Y. 71.

defendants as trustees of said corporation, to recover the debt due from the corporation because of alleged failure to file and publish the annual report for the year 1874.

The facts sufficiently appear in the opinion.

SAMUEL HAND, for the appellants.

C. F. BROWN, for the respondents.

ANDREWS, J.

It is claimed on the part of the defendant Henry A. Seaman, that he was not a trustee of the "Shenandoah Mining Company" and is not therefore liable for the debts of the company, assuming that there was a failure to make the annual reports required by the twelfth section of the act of February 17, 1848, under which the company was organized. This claim, if well founded, is a complete defense to the action so far as Henry A. Seaman is concerned, and this point will be first considered. It is claimed that he became a trustee by virtue of the election held September 11, 1874. There was no election of trustees at the annual meeting of the stockholders in June of that year. The by-laws, however, provided for a subsequent election in case the election was not held at the annual meeting, and so far as appears the election in September was regular.

The defendant Henry A. Seaman was a stockholder of the company, and otherwise qualified to be elected trustee, and by virtue of his election was entitled to hold the office. But the fact that he was elected a trustee did not alone invest him with the character of trustee, so as to charge him with the duties and responsibilities of the office. There must in addition have been an acceptance on his part of the office to which he was elected. He was not bound to accept the position. He did not, by becoming a stockholder in the corporation, undertake to act as trustee if elected. It was not necessary that the defendant should, by a direct and positive act, assent to the action of the stockholders. His acceptance could be shown by conduct on his part indicating an intention to accept the office, and might be implied from circumstances. In this case there

is nothing to show such an intention, and the circumstances proved are inconsistent with the theory that he accepted the office. He was not present at the election. Before the election was held the property of the company had been sold on a foreclosure. There was remaining, after the sale, an unpaid indebtedness of more than $50,000, and no assets with which to pay it. The business of the company was suspended, and although the corporation, as a legal entity, still had an existence, it was practically dissolved. The secretary of the stockholders' meeting, who was also the president of the company, testified that after the election he notified by letter the persons elected as trustees of their election. The defendant Henry A. Seaman testified that he never received any written notification of his election, and that the only notice he had was an oral communication made to him by the president of the company, and that he then told him he should not serve. There is no denial of the testimony in respect to this conversation. He never acted as trustee, and the trustees elected in September, 1874, so far as appears, never met, and in January, 1875, the board of trustees elected in 1873, claiming to hold over, made, filed and published a report in assumed compliance with the twelfth section of the act of 1848. The learned judge before whom the cause was tried, found that the defendant Henry A. Seaman was a trustee of the company in January, 1875, and rendered judgment against him on the ground that the company had not complied with the statute in making the annual report for that year, and that thereby the defendant became liable for the debt due to the plaintiff from the company. We are of opinion that there is no evidence to sustain the finding that Henry A. Seaman was a trustee of the company in January, 1875, and that the judgment against him should for that reason be reversed.

The liability of the defendant Robert Seaman is claimed upon other and distinct grounds. He was elected a trustee at the annual election in 1873, and was re-elected in September, 1874, and acted as trustee under the first election. The debt due to the plaintiff from the company was contracted in 1873. The trustees, in January, 1874, prepared the annual report, containing a statement of the facts required to be stated therein by the twelfth section of the act of 1848, and on the 20th of

January of that year the report was signed by the president and a majority of the trustees of the company and verified by the president. On the same day it was sent by mail to the clerk of Dutchess county, at Poughkeepsie, to be filed. The clerk received and filed it on the 22d of January. The trustees also, on the 21st of January, sent a copy of the report by mail to the "Poughkeepsie Eagle," a newspaper published at Poughkeepsie, for publication, and it was published therein on the 24th of January. From these facts it appears that the report was prepared, signed and verified within twenty days from the first of January, 1874, was mailed to the clerk of the county on the same day, but was not filed until the next day, and was first published on the 24th of January. It is contended on the part of the plaintiff that by the true construction of the 12th section of the act, the filing and publication of the report must be done within twenty days from the first day of January in each year, and that it is not sufficient that it is prepared, signed and verified within that time, and filed and published as soon as practicable thereafter. The 12th section is as follows: "Every such company shall annually, within twenty days from the first day of January, make a report, which shall be published in some newspaper published in the town, city or village, or if there be no newspaper published in said town, city or village, then in some newspaper published nearest the place where the business of the company is carried on, which report shall state the amount of capital and of the proportion actually paid in, and the amount of its existing debts, which report shall be signed by the president and a majority of the trustees, and shall be verified by the oath of the president or secretary of said company, and filed in the office of the clerk of the county where the business of the company shall be carried on; and if any of said companies shall fail to do so, all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made."

The question is, must the report be filed and published within the twenty days from the first of January in order to meet the requirements of this section. The statute must have a fair and reasonable interpretation, and effect must be given to

it according to the intention of the legislature as indicated in the language used. The language is not to be wrested from its true meaning to protect trustees against liability, however serious, to which they may be exposed; and, on the other hand, the statute being in the nature of a penal statute, is to be strictly construed, and can not be extended beyond the clear import of its language: Smith on Statutory and Constitutional Construction, 854; *Garrison* v. *Howe*, 17 N. Y. 458; *Verona Co.* v. *Murtaugh*, 50 N. Y. 314.

The general purpose of the section is clear, viz.: to provide authentic information to creditors of the company and those who might have dealings with it, of its financial condition at fixed recurring periods, so as to enable them to act intelligently in their transactions with the corporation. That this object would be accomplished by requiring a report to be prepared within the time limited in the statute, and filed and published as soon as practicable thereafter, as well as by requiring the several acts of mailing, filing and publishing the report to be performed within the twenty days, can not be seriously doubted. The language is that the company "shall annually, within twenty days from the first day of January, make a report," and then follows a direction that it shall be published, etc. The publication necessarily is an act to be done after the making of the report previously mentioned, and so also is the filing. To make a report may mean either the preparation of the report simply, by the person or body charged with the duty, or it may, in addition, include the act of presenting or communicating it to the person or body to whom the information contained in it is to be given. We are of opinion that the words "make a report" in this section refer to the preparation, signing and verification of the report, and that the limitation of twenty days does not apply to the acts of filing or publication. The statute intended to give the company twenty days after the first day of January in each year, to make up their accounts and prepare the statement to be embodied in the report. If the publication and filing must be also made within the twenty days in order to protect the trustees from personal liability, very serious burdens might be imposed upon them without their fault. The neglect of a newspaper to publish the report, although it was furnished for publi-

cation within the twenty days, and in due time for insertion in its regular issue, would not protect the trustees against the statute liability. They would be made, upon the construction of the statute contended for, liable for the neglect of persons over whose conduct they had no control. If the company prepare the report within the time limited, and cause it to be filed and published as soon thereafter as practicable, there is, we think, a compliance with the statute. The law implies, in the absence of an express provision on the subject, that the filing and publication must be within a reasonable time after the twenty days, and this requirement, in view of the object of the statute, could only be satisfied by prompt performance and diligent action on the part of the trustees. We are of opinion, therefore, that the defendant Robert Seaman is not liable by reason of the omission to file and publish the report within twenty days from the first day of January, 1874.

There is an independent ground upon which the liability of this defendant is claimed, viz.: that the "Poughkeepsie Eagle," in which the report was published, was not a newspaper published nearest to the town of East Fishkill, where the mines of the company were located, and which was the place named in the certificate in which the operations of the company were to be carried on. There was no newspaper published in the town of East Fishkill, and the company were therefore required by the statute to publish the report "in some newspaper published nearest the place where the business of the company was carried on." This place within the meaning of the statute was the *town* of East Fishkill. There was a newspaper published in the village of Fishkill in the town of Fishkill, which adjoined the town of East Fishkill. Fishkill Village was nearer the mine than Poughkeepsie, but as I understand the evidence, one part of the town of East Fishkill was nearer to Poughkeepsie than was Fishkill Village from the same point. Under these circumstances, a publication in either paper would be a substantial compliance with the statute. Fishkill Village was nearer to one point of the town of East Fishkill than Poughkeepsie, while Poughkeepsie was nearer to another point than Fishkill Village.

The report made in January, 1875, was made by the trustees elected in 1873. If they held over for any reason, they were

the persons whose duty it was to make it. If they did not hold over, no duty rested upon the defendant Robert Seaman, as one of the trustees elected in 1874, for there is no evidence that he accepted the office under that election.

The judgment should be reversed and a new trial granted.

All concur, except FOLGER and RAPALLO, JJ., who dissent from the result as to defendant Robert Seaman, on the ground that the manufacturing act requires the report to be not only made, but also filed and published within twenty days from January first of each year.

Judgment reversed.

PRATT, EX'X, v. TAUNTON COPPER MANUFACTURING CO. ET AL.
SAME v. MACHINISTS NATIONAL BANK ET AL.

(123 Massachusetts, 110; 25 Amer. R. 37. Supreme Court, 1877.)

Title to stolen stock can not be divested out of the real owner by sale at auction and purchase by innocent buyer.

[1] **Unauthorized reissue of stock—No remedy against innocent holder.** Shares of stock were taken without the owner's knowledge and with a forged power of attorney delivered to auctioneers for sale. The auctioneers procured new certificates from the company and, in turn, their vendee procured new certificates: *Held*, in a suit by the owner against the corporation *and* purchaser, that the owner was entitled to a new certificate from the corporation and to the dividends, but not to a decree against the purchaser, and that the contention between the corporation and the purchaser must be settled in a suit between themselves.

A court can not without their consent decree the rights incidentally involved between co-defendants in which plaintiff has no interest.

G. E. WILLIAMS, for the plaintiff.

E. H. BENNETT, for the corporations.

J. H. HARDY, for the individual defendant in the first case.

A. S. WHEELER, for the individual defendant in the second case.

GRAY, C. J.

[1] *Mandlebaum* v. *North Am. Co.*, 5 M. R. 506.

The plaintiff was the owner of shares in each of the defendant corporations, and held certificates therefor, which were taken from her house without her knowledge, and together with a forged power of attorney in her name to the corporation, delivered to W. N. Field & Company, brokers, for sale. Field & Company employed Hawes & Henshaw, stock auctioneers, to sell the shares by auction and they sold them accordingly. Field & Company afterward presented the certificate and power of attorney in the one case, to the clerk of the corporation, duly empowered to make transfers, and in the other case to the cashier of the bank, and obtained from each a transfer of the stock, and a new certificate with a new number, in the name of Hawes & Henshaw, and delivered it to them, and Hawes & Henshaw delivered and assigned the new certificate to the purchaser in each case, who thereupon paid to them the sum for which he had bid off the stock, which was its fair market value, and they paid the same, less their commission, to Field & Company. The purchaser surrendered the new certificate to the corporation, and the corporation thereupon issued to him another certificate which he now holds. Neither Hawes & Henshaw nor the purchaser had any knowledge, until after the transfer and issue of the certificate to him, that the plaintiff ever owned the shares; and the purchaser did not see any certificate of the stock until he paid for the one issued to him.

The plaintiff brings a bill in equity against each of the corporations and the purchaser of the shares therein, praying that the latter may be ordered to surrender his certificate to the corporation to be canceled, and that the corporation may be ordered to issue to the plaintiff a new certificate for her shares, and to pay to her all dividends declared or to be declared thereon to the date of the decree, and for further relief.

The questions reserved for our determination in each case by the justice before whom the hearing was had are: 1st. Whether the plaintiff is entitled to the relief prayed for in the bill; 2d. Whether she is entitled to relief against the defendant corporation alone; 3d. Whether she is entitled to relief against the individual defendant, and if so, whether the corporation should be ordered to pay to him the amount paid by

him for the stock in question, with interest from the date of payment, or any other amount.

It is quite clear that the plaintiff could not be deprived of her stock without consent or negligence on her part, and that the power of attorney in her name being forged, she may maintain each of these bills to compel the corporation to issue a certificate to her for her shares, and to pay her the dividends thereon: *Ashby* v. *Blackwell*, 2 Eden, 299; Ambl. 503; *Sloman* v. *Bank of England*, 14 Sim. 475; *Midland Railway* v. *Taylor*, 8 H. L. Cas. 751; *Pollock* v. *National Bank*, 7 N. Y. 274; *Sewall* v. *Boston Water Power Co.*, 4 Allen, 277.

But the individual defendant was a purchaser in good faith for full consideration, without knowledge or notice of the plaintiff's title or of the forgery, and does not hold the certificates which she had. The immediate transfer to him was made by Hawes & Henshaw, who then held a new certificate of stock; and the corporation, upon his surrender of that certificate, issued to him another one. His rights against the corporation depend upon the effect of this certificate, and the plaintiff is clearly entitled to no decree against him: *Salisbury Mills* v. *Townsend*, 109 Mass. 115; *Lowry* v. *Commercial Bank*, Taney, 310; *Bank* v. *Lanier*, 11 Wall. 369; *In re Bahia & S. F. Ry.*, L. R., 3 Q. B. 584. If he had claimed, under a transfer which he knew, or was bound to know, to be forged or invalid, a different case would have been presented: *Cottam* v. *Eastern Counties Railway*, 1 Johns. & Hem. 243; *Johnston* v. *Renton*, L. R., 9 Eq. 181; *Tayler* v. *Great Indian P. Ry.*, 4 De G. & J. 559; *Denny* v. *Lyon*, 38 Pa. St. 98.

It is contended upon the precedent of *Ashby* v. *Blackwell*, above cited, that the decree should order the corporation to pay to the other defendant the sum which he paid for the stock. But the reports of that case show that all the parties submitted to the decision of the court, as the only question, whether the purchaser or the company should bear the loss. Where, as in this case, the relief given to the plaintiff does not require or involve the decision of any question between co-defendants, the court, unless by consent, does not and can not decide such a question so as to bind the co-defendants as against each other, but leaves it to be settled in a proper suit between them: *Cottam* v. *Eastern Counties Railway*, and

Johnston v. *Renton*, above cited; *Cottingham* v. *Shrewsbury*, 3 Hare, 627, 638; *Fletcher* v. *Green*, 33 Beav. 426; *Sewall* v. *Boston Water Power Co.*, 4 Allen, 277, 283; *Carlton* v. *Jackson*, 121 Mass. 592, 597.

The result is that in each case there should be a decree for the plaintiff against the corporation, with costs; and as to the other defendant, the bill should be dismissed without costs; this decree to be without prejudice to any question at law or in equity between the co-defendants.

Decrees accordingly.

STONE, Respondent, v. MARYE ET AL., Appellants.

(14 Nevada, 362. Supreme Court, 1879.)

[1] **Owner estopped from asserting title to stock—Innocent purchasers.** Where S., by her own voluntary act had, through misplaced confidence, conferred upon M. the apparent right of property in certificates of mining stock, and M. thereupon employed brokers to sell the stock, who did so in ignorance of the claim of S. thereto: *Held*, that S. was estopped from asserting title to the stock as against the brokers.

Appeal from the District Court of the First Judicial District, Storey County.

The facts are stated in the opinion.

LEWIS & DEAL and E. B. STONEHILL, for appellants.

The plaintiff having clothed her creditors with all the *indicia* of ownership and enabled them to transfer the stock to innocent parties without notice of her interest, should suffer any loss occasioned by her own act: *Brewster* v. *Sime*, 42 Cal. 139; *Thompson* v. *Toland*, 48 Id. 99; *Crocker* v. *Crocker*, 31 N. Y. 507; *McNeil* v. *Tenth Nat. Bank*, 46 Id. 325; *Winter* v. *Belmont M. Co.*, 53 Cal. 428.

C. H. BELKNAP, for respondent.

[1] *Brown* v. *Howard Ins. Co.*, 42 Md. 384; 20 Am. R. 90.

By the Court, HAWLEY, J.

From the facts in this case, as found in the court below, it appears that in the month of September, 1877, the plaintiff deposited with Martha McSweegan two certificates representing fifteen shares of the capital stock of the Ophir Silver Mining Company, as collateral security for the payment of one hundred and eighty-five dollars, then due and owing from said plaintiff to said McSweegan; that thereafter plaintiff tendered to Martha McSweegan the full amount of said indebtedness, and demanded the return of said certificates of stock, which was refused; that thereafter said Martha McSweegan assigned said indebtedness to William Gordon, for a valuable consideration, and delivered to said Gordon said certificates of stock as security for said loan; that Gordon received the certificates with full knowledge of the circumstances under which they were held by the said Martha McSweegan; that thereafter plaintiff tendered to said Gordon the full amount of said indebtedness, and demanded a return of said certificates, which was refused; that thereafter, on the sixth day of October, 1877, the said certificates of stock were delivered to the defendants by said Gordon, and on the thirtieth day of October, 1877, said Gordon employed defendants, at Virginia City, Nevada, as stock brokers, to sell said certificates in the San Francisco Stock and Exchange Board; and that said defendants, as such stock brokers, did cause said certificates to be sold for said Gordon, and passed the proceeds thereof to Gordon's credit; that at said dates Gordon represented and claimed to be the owner of the said certificates; and the defendants had no notice at any time, until the eighteenth day of December, 1877, that plaintiff owned, or claimed to own, said certificates, or either of them, or that she had any interest in either; that on the eighteenth day of December, 1877, the plaintiff demanded of the defendants the possession of said certificates of stock, and defendants refused to deliver the same; that said certificates of stock were in the usual form of certificates representing mining shares, one being in the name of and indorsed by "Cahill & Co., trustees," the other in the name of and indorsed by "Cope, Uhler & Co., trustees;" that it is the custom in the State of Nevada and in the State of California

to deal in mining stocks and transfer certificates of the Ophir and other mining stocks by indorsement on the certificates in the same manner as the certificates in question were indorsed, and that such custom had prevailed from the first of January, 1877, up to the present time.

Upon this state of facts, we are of opinion that the court erred in rendering judgment in favor of the plaintiff.

The plaintiff having allowed McSweegan and Gordon to appear at different times as the true owners of said certificates of stock, with full power and control over the property, to be exercised in such a manner as to induce innocent third parties to deal with them, or either of them, as the true owner, is estopped from asserting her title to the same as against the defendants, who had no knowledge of the true state of the title.

The rights of the defendants, as stock brokers, do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the acts of the real owner, which precludes her from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, she caused or allowed to appear to be vested in the party who delivered the certificates to the defendants.

All the authorities cited by appellant fully sustain this position. See also *Moore* v. *Metropolitan Bank*, 55 N. Y. 46; *Holbrook* v. *New Jersey Zinc Co.*, 57 N. Y. 616.

The judgment of the district court is reversed, and cause remanded for a new trial.

WINTER v. THE BELMONT MINING CO.

(53 California, 428. Supreme Court, 1879.)

[1] **Title of innocent purchaser of stolen certificates upheld.** W., being the owner of certain shares in the Belmont Mining Co., caused them to be transferred on the books of the company to "M., trustee," who indorsed the certificates in blank, and delivered them to W., but subsequently stole them from W. and sold them in market at full value to an innocent

[1] See *Barstow* v. *Savage M. Co.*, 64 Cal. 388; 49 Am. R. 705.

purchaser. *Held*, that the purchaser acquired a good title, and that W. could not maintain conversion against the company for a refusal to reissue the stock to him.

Appeal from the District Court of the Fourth Judicial District, San Francisco.

The plaintiff was the owner of certain shares of the capital stock of the defendant, and caused them to be transferred on the books of defendant to the name of "M., trustee." M. afterward indorsed the certificates in blank, and delivered them to plaintiff. Subsequently he stole them from the plaintiff and sold them in the market, the purchaser taking them in the ordinary course of business, in good faith, and without any knowledge of plaintiff's claim, and at their full market value. After the sale the plaintiff discovered the theft, notified the defendant thereof, and demanded a transfer of the shares. The demand was refused, and thereupon the plaintiff brought this action for conversion. Judgment was rendered for the plaintiff and the defendant appealed.

JARBOE & HARRISON, and STEWART & GREATHOUSE, for appellant.

S. W. HOLLIDAY, for respondent.

By the Court, CROCKETT, J.

In *Weston* v. *Bear River M. Co.*, 6 Cal. 425, the action was a bill in equity, alleging that the plaintiff purchased at execution sale certain shares of the capital stock of the defendant corporation, which stood on the books of the corporation in the name of Lovell, the defendant in the execution. It was further alleged that the defendant Swift had possession of some, and the defendants Reese & Buckingham fo others of the certificates, which they refused to surrender, and the prayer of the complaint was for a decree to compel the surrender of the certificates, and that the corporation issue new certificates to the plaintiff. It appeared from the answers that the certificates held by Swift had been hypothecated to him, and those held by Reese & Buckingham had been sold to them, be-

fore any lien had attached thereon in the suit in which the execution issued, under which the plaintiff purchased, and that when he purchased he had notice of such sale and hypothecation; and further, that the certificates held by Reese & Buckingham had been surrendered, and new certificates issued to them. The court found the facts to be as alleged in the complaint and answers, and entered a decree for the plaintiff. On appeal, it became necessary for this court to pass upon the provisions of the Corporation Acts of 1850 and 1853, regulating the transfer of the shares of a private corporation. These provisions were substantially the same as Sec. 324 of the Civil Code, which provides that when the capital stock of a corporation is divided into shares, and certificates therefor are issued, such shares of stock are personal property, "and may be transferred by indorsement by the signature of the proprietor, or his attorney or legal representative, and delivery of the certificate; but such transfer is not valid, except between the parties thereto, until the same is so entered on the books of the corporation as to show the names of the parties by and to whom transferred, the number or designation of the shares, and the date of the transfer."

In construing similar provisions in the acts of 1850 and 1853, the court, in the Weston case, said: "A party who purchases, at sheriff's sale, stocks of an incorporation, knowing that the certificates of such stock have been previously hypothecated, is chargeable with notice of such fact, and takes subject to the claim of the pledgee. Neither the Incorporation Law of 1850 nor 1853 was intended to cover a case of this kind, *but apply only to transfers and purchases in good faith without notice.*" It therefore decided that the plaintiff was not entitled to equitable relief, and the judgment was reversed. The court reached this conclusion solely on the theory that the statutes regulating the transfer of certificates of stock in a private corporation imparted to the certificates, as between third persons, the character of negotiable instruments. The effect of the decision was that if the certificates had been hypothecated before the attachment lien accrued, and if the purchaser at the execution sale took with notice of the prior hypothecation, he acquired no rights as against the pledgee. The reverse of the proposition would, of course, be true, and if he had purchased

without notice, his title would have prevailed as against the pledgee; or as the court expresses it, that the provisions of the statute "apply only to transfers and purchases in good faith without notice." In other words, that the statute had placed the certificates in so far on the footing of negotiable instruments, that if they had been hypothecated before the attachment lien accrued, nevertheless if the purchaser at the sheriff's sale, to enforce the lien, had purchased without notice of the hypothecation, he would have acquired a valid title as against the pledgee.

In the subsequent cases of *Naglee* v. *Pacific Wharf Co.*, 20 Cal. 533, and *People* v. *Elmore*, 35 Cal. 655, similar questions arose; and though not fully approving the decision in the Weston case, the court thought it was too late to disturb it after so great a lapse of time, and that it ought to stand, on the principle of *stare decisis*. This consideration has acquired much additional force from the long period which has since elapsed; and even though we entertained a grave doubt as to the soundness of the original decision, we think it ought not now to be disturbed.

Assuming that decision to be correct, the principle which it decides is not distinguishable from that involved in this case. If the purchaser in good faith and without notice, under an attachment levied on stock in a corporation, as the property of the registered owner, will acquire a good title as against a prior pledgee or purchaser of the certificate, certainly a purchaser at private sale in good faith, and without notice, in the usual course of business, of a certificate issued to the registered owner, and duly indorsed by him, ought to stand on at least as favorable a footing. In support of these views, we refer also to the case of *Brewster* v. *Sime*, 42 Cal. 139, and *Thompson* v. *Toland*, 48 Cal. 112, much of the reasoning in each of which is applicable to the question under discussion.

In the case of *Sherwood* v. *Meadow Valley M. Co.*, 50 Cal. 412, our attention was not called to the foregoing decisions, nor to the statute regulating the transfer of stocks in private corporations. Without referring to these decisions or to the statute on which they were founded, counsel in the Sherwood case discussed the sole proposition whether a certificate of this character, on general principles of commercial law, was negotia-

ble in the sense in which bills of exchange and other similar instruments are negotiable, and we held they were not, which was the only point decided in that case.

Judgment reversed and cause remanded.

SMITH ET AL., Respondents, v. NORTH AMERICAN MINING CO., Appellant.

(1 Nevada, 423. Supreme Court, 1865.)

Commission to take deposition. A commission to take a deposition, issued in accordance with a previous order of the court, attested by the certificate of the clerk, and under the seal of the court, is in compliance with the statute.

District rules not required to have the age of customs. Mining customs, under the Nevada statute, may be proved, however recent the date or short the duration of their establishment. The common law doctrine as to customs, does not govern in such cases.

[1] **Discoverers incorporate—Error in issue of stock—Stock not void.** Where the locators of a mining claim and their assigns consolidated their interests, and conveyed to the trustees of a corporation, which corporation was to issue stock to the parties who thus conveyed in proportion to the number of feet each had conveyed, and an error was made in the distribution of shares, the discoverer not being allowed for his additional claim, so that the others received more and the discoverers received less than their respective claims in feet entitled them to: *Held*, that the corporation was bound to purchase shares and transfer them to the discoverer, or pay him their value, or issue new shares to him, unless the full quota had been issued: *Held, further*, that the shares wrongfully issued to the other parties in excess of their proportion were not invalid.

The measure of damages is the value of stock at date of decree, where the wrong complained of is a case of mistake, and not the act of a willful wrongdoer.

Rights of discoverer—Conflicting evidence. Where the ownership of the additional claim by the discoverer at the time of such consolidation is admitted, it would require clear and positive evidence to show that he waived or relinquished his right thereto, or allowed it to be merged on equal terms with the claims of others, who had no additional rights as discoverers. And where in such case one witness declares that the discoverer assented to the division of his additional claim among the company, and another testified that he objected to such division, it was held his assent to such division was not proved.

Limit of stock issue. A court can not order stock issued where the limit of issue has already been reached.

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[1] *Foreman* v. *Bigelow*, 13 M. R. 269; *Kent* v. *Quicksilver Co.*, 4 M. R. 47.

Innocent purchaser. Stock, though wrongfully issued, can not be declared void to the injury of an innocent holder.

Appeal from the District Court of the First Judicial District, State of Nevada, Storey County, Hon. RICHARD RISING, presiding.

The facts are stated in the opinion.

HILLYER & WHITMAN, for appellant.

TAYLOR & CAMPBELL, for respondents.

By the Court, BEATTY, J.

The facts of this case are as follows: The plaintiffs, Smith and Gottschall, with eleven others, took up a mining claim in 1859. The notice of location contained thirteen names, but claimed fourteen shares of three hundred feet each. One extra share was claimed as a discoverer's right. Subsequently these locators and their successors in interest were incorporated under the name of the North American Mining Company. It was provided one share of stock should be issued for each foot of ground located; or, in other words, four thousand two hundred shares of stock were to be issued to the stockholders, each receiving in proportion to the ground he held. The mining ground was all conveyed to the corporation or its trustees, and stock issued to claimants. The plaintiffs claim they are entitled to a larger share of stock than they have received. They aver that Gottschall was the discoverer of the ledge, and in right of discovery was entitled to the extra share of three hundred feet. That Smith, by virtue of an agreement between them, was interested to the extent of one half in the same.

The answer denies that Gottschall was the discoverer, or entitled to the three hundred feet by reason of being the discoverer, and avers that he and Smith had each received the full share of stock to which they were entitled. On the trial it was attempted to be shown by the defendant that Gottschall was not the discoverer, and if he was, that he waived his right as such in favor of the company, and that the discoverer's share was equally divided out among the thirteen locators.

The court below find in effect that Gottschall was the first discoverer. That he had not waived his right, and was not estopped from asserting it. That the discovery claim had been improperly divided among the different stockholders, giving Smith and Gottschall each one thirteenth, when they were each entitled to one half of the discovery claim, and decreeing that the company should issue to them a sufficient number of shares to make, with what they had already received, the entire three hundred feet, less a few feet which had been used for the common benefit of the corporation. The defendant appeals from this judgment, and raises various points of error. That the commission under which a deposition was taken and read, was insufficient; that a motion for non-suit was improperly overruled; that testimony as to a mining custom was improperly received; that the court erred in various rulings as to admission and exclusion of testimony, etc.; and finally, that the findings were against the weight of testimony.

The commission was issued in accordance with a previous order of the court. It was attested by the certificate of the clerk and under the seal of the court. We think it is in compliance with the statute.

The motion for non-suit was properly overruled. The testimony as to a mining custom was properly admitted. Such customs under our statute may be proved, however recent the date or short the duration of their establishment. The common law doctrine as to customs does not govern in such cases. The rulings of the court as to the admission and rejection of testimony were, we think, right, with perhaps one exception, which we will hereafter notice.

As to the point made that the findings are against the weight of testimony, we can only say that the evidence that Gottschall was the discoverer of the mine is not as satisfactory as could be wished. We would suppose that clear and indisputable evidence might be brought as to a fact of this kind. Nevertheless there is sufficient evidence to justify the finding that he was the discoverer. If it once be admitted that he discovered the claim, and was by right of discovery entitled to the fourteenth share of three hundred feet, then he could only lose that right by some clear and positive evidence of having divested himself thereof.

The only evidence offered to this effect is, that at a meeting of the proprietors about the time of the incorporation, the question was raised as to what was to be done with the discoverer's share. One witness says Gottschall agreed to let it be divided among the entire company; another says he objected to such division and claimed it for himself and Smith. There are some other slight circumstances tending to show he might have known that the company claimed this fourteenth share as the common property of the company. We think such evidence does not show that Gottschall ever divested himself of his claim to the three hundred feet, or that he is in any manner estopped from claiming them. We are satisfied with the finding of the court below.

During the progress of the trial the defendant offered to prove that the entire four thousand two hundred shares of stock had been issued, and consequently no new stock could be issued to plaintiffs without extending the limit of shares fixed by the constitution of the company. This evidence was rejected by the court. This ruling and the form of the decree present the real difficulties of the case. We are satisfied that when a corporation has issued certificates of stock (which are valid and not void) to the full extent of all the shares, which, by law and the constitution of the company, it may issue, no court can order the issuance of other shares, because in that respect the powers of the corporation have been exhausted. See *Mechanics' Bank* v. *New York R. R.*, 3 Kernan, 599.

The first question, then, to be determined, is, were the certificates issued to the locators other than Smith and Gottschall for their supposed proportion of the discoverer's share absolutely void, or were they valid certificates issued to the wrong parties.

If void, then the ruling and decree are right, and the judgment must be affirmed. If, however, these certificates are not void, then the plaintiffs are entitled to a different remedy. They must be entitled to a pecuniary compensation from the company, or else to a remedy against the other locators who received more stock than they were entitled to.

Again, what is the extent of the remedy to which they are entitled? If they receive stock from other locators, must they not refund any assessments paid by those to whom the stock was issued? If they receive pecuniary compensation from the

corporation, are they to receive the full value of the stock, or its value less the amount of assessments paid or payable on the same? These are most important questions, not merely in this case, but to all mining corporations. Doubts must frequently arise as to how many shares particular individuals are entitled to in mining corporations; mistakes must frequently be made in issuing shares. It is highly important to have some fixed rule as to how these mistakes are to be corrected. Who are to be made parties to a bill for that purpose? What is to be the nature of the relief afforded? Before determining this case we wish to hear argument on the points suggested We are not only willing to hear argument from the counsel in this case, but also from the counsel of other mining companies who are interested in the question.

We shall order the case on the October calendar for further argument on the points suggested.

Opinion, after re-argument, by BEATTY, J., full bench concurring.

When we wrote our former opinion in this case we left certain propositions undecided, and ordered the case on the calendar for argument upon the points suggested. By leave of the court the counsel for appellant filed a brief on one point not left open by the order of the court, re-submitting the case. That point was as to the alleged error of the court below in rejecting the company books when offered in evidence by the appellant. As we understand the record, it shows that when the books were first offered, the court ruled they were not admissible, on account of certain alterations and erasures contained in them. Afterward, when those erasures were explained, the books were admitted. Even admitting the court erred in rejecting the books in the first place, the subsequent admission of them cured the error, and this was no ground for reversing the judgment. It was for the reason that these books were subsequently admitted that we failed to notice this point in our original decision.

This brings us back to the question propounded in our original opinion: "Were the certificates issued to the locators other than Smith and Gottschall for their supposed proportion of the discoverer's share absolutely void, or were they valid certificates issued to the wrong parties?"

The briefs which have been filed, however able and ingenious in argument, have failed to furnish any authorities bearing on this point.

After mature reflection we are inclined to think and so hold, that certificates issued under the circumstances of this case are not void, but valid certificates. That when certificates for four thousand two hundred shares of stock had been issued to those who signed the trust deed, the powers of the trustees in this regard were exhausted.

That no more shares could be issued, and those issued should be held to represent the valid stock of the company and should be good in the hands of any party receiving them by regular assignment and transfer on the books of the company. Here are, say, thirteen persons who unite in a deed of all their interests in a mining claim, which may be treated as a piece of real estate, embracing a certain number of feet or acres of land. The trustees are to hold this for corporate purposes, and issue stock or certificates of stock to each of the grantors in proportion to their respective interests in the real estate. It is the interest of all the members of the corporation that the certificates thus issued by the trustees of their own choice should be negotiable in the market. At least, if they do not acquire all the qualities of negotiable paper, that the public may rely with certainty on the proposition that certificates of stock issued by the trustees of a corporation to those who unite in the trust deed, and not exceeding in number of shares issued, the limit fixed by the act of incorporation, should ever afterward be held as valid evidence that the *bona fide* holders thereof are stockholders to the extent shown by the certificates. Any other rule would be highly prejudicial to the general interests of mining corporations.

The original stockholders in such associations almost universally wish to sell portions of their stock to pay assessments and develop claims. If those who deal in stocks are required to go back of the action of the trustees in distributing their certificates of stock, and ascertain that they have made no mistake as to the number of shares issued to each stockholder, it would greatly interfere with the transfer of stocks and the safety of those who deal in them. It would also operate very injuriously, as we have before stated, on the original share-

holders, by making their certificates less negotiable. Indeed, we can not see well how we could go behind the distribution of the trustees in regard to stock scattered among a number of the assignees of the original stockholders.

Suppose A, B and C form a corporation to contain three hundred shares, and convey their mining claim to a trustee or trustees, who are to hold the realty for corporation purposes, and issue certificates of stock to those who sign the trust deed. The trustee issues to A ten certificates of stock for ten shares each; they are issued at the same time, but numbered one to ten. A goes into the market and sells these different certificates; the first certificate he sells is No. 10; the last, perhaps, is No. 1.

After he has sold all his stock it is discovered that he was entitled to only ninety shares of stock, while he got certificates for one hundred; on the other hand, C was entitled to one hundred and ten, and only got one hundred. Will the court direct one of A's certificates to be canceled, and one of the same kind issued to C? If so, which one will be canceled? All are in the hands of innocent purchasers. If it is proposed to cancel No. 10, as the last one issued, and the one which was in excess of A's just proportion, the holder might well say, although highest in number it was issued simultaneously with all his other certificates, and as A was undoubtedly entitled to ninety shares when he sold ten to me, my certificate should be held good.

If you propose to cancel certificate No. 1, the holder might well say, when this was issued: A was entitled to ninety shares. This was probably the very first certificate issued. Its number indicates that it was first signed and made out, though delivered simultaneously with nine other certificates. It being the first certificate in order, and knowing that A was entitled to some stock, I had a right to buy it, without inquiring what other stock A may have sold.

To determine in such cases which stock should be canceled in the hands of an innocent holder would sometimes be impossible. The safest and most convenient rule, we think, is not to go behind the distribution made by the trustees when the stock has passed into the hands of innocent holders.

In other words, we hold that all stock issued by trustees,

under the circumstances of this case, must be held as valid stock. If the full number of shares was issued before the filing of their bill, the court can not order the issuance of additional stock, and, therefore, erred in refusing to permit appellant to prove all the stock of the company was issued and in the hands of the stockholders. For this reason the case must be reversed and a new trial granted.

The court below will allow either party desiring it to amend their pleadings, and bring other parties before the court. With proper parties before the court it would doubtless be competent for that tribunal to order those who originally obtained more shares than they were entitled to (if they still hold them) to assign the surplus shares to plaintiffs, upon plaintiffs paying the amount of any assessments with legal interest, which the holders have paid.

Of course, if the holders of those shares have received dividends they must account for them. Where the parties who have received the excess of shares are no longer stockholders to a sufficient extent to replace the stock improperly received, the company must make good to plaintiffs the value of the stock not replaced or purchase other stock to replace it. The criterion of damages will be the value of the stock when the decree is made. The plaintiffs will also be entitled to any dividends made on this stock, and will be chargeable with any assessments paid. This is a mistake of the trustees who were the mutual agents of all parties. For this reason the criterion of damages is different from the case where a party is deprived of his stock by a wrong-doer.

If the company is compelled to pay for any portion of the stock, it will be entitled to indemnity from the parties who received and sold the excess of stock.

As new parties will probably be before the court on the next trial of this case, who may wish to introduce other and new evidence about the discovery of the claim, the court below will try the whole case *de novo*.

LADD ET AL. v. CARTWRIGHT.

(7 Oregon, 329. Supreme Court, 1879.)

Liability of assignor of unpaid stock—Demand necessary. Under the Constitution of Oregon the stockholders of all corporations and joint stock companies are liable for the corporate indebtedness to the amount of their stock subscribed and unpaid, and no more; and by statute "All sales of stock subject the purchaser to the payment of any unpaid balance due or to become due on such stock; but if the sale be voluntary the seller is still liable to existing creditors for the amount of such balance unless the same be duly paid by such purchaser." Under these provisions it is not sufficient to constitute a cause of action against a stockholder who has made a voluntary sale of his stock, to aver that there is an unpaid balance due or to become due upon said stock: but it should be further averred that such balance, after demand by the properly authorized officers of the corporation, remains unpaid.

[1] **Corporation to be first pursued.** A creditor of a corporation can not proceed in the first instance against a stockholder upon his individual liability without first having shown that he has exhausted his remedy against the corporation.

[2] **Equity is the only proper forum** for enforcing the personal liability of stockholders.

Appeal from Marion County.

On the 20th of April, 1873, the Pioneer Oil Company, a private corporation, was indebted to the appellants in the sum of forty-four thousand five hundred dollars. On that day the respondent voluntarily sold one hundred and forty shares of the stock of the company of which he was the owner.

At the time of such sale there was unpaid upon each of the shares sold, the sum of seventy dollars, on the one hundred and forty shares the sum of nine thousand eight hundred dollars, of which there remained unpaid at the commencement of the action sixty dollars per share, or upon all the shares, eight thousand four hundred dollars.

This action was brought to recover from Cartwright, the seller of the stock, this unpaid balance.

[1] *Milroy* v. *Spurr Mt. Co.*, 12 M. R. 53.

[2] *Stone* v. *Chisolm*, 113 U. S. 302; *Hightower* v. *Thornton*, 8 Ga. 486; 52 Am. Dec. 412.

The court sustained a demurrer to the complaint alleging these facts, and the respondent had judgment, whereupon this appeal was brought.

W. W. THAYER and J. A. STRATTON, for appellant.

RUFUS MALLORY and TILMON FORD, for respondent.

By the Court, PRIM, J.

The respondent was not an original subscriber of stock in this corporation, nor was he the holder of any stock therein at the time when this action was commenced; but it is sought to maintain this action against him, upon the ground that he was the owner of one hundred and forty shares of its stock by purchase, on and from April 20th, until April 23, 1873, at which last mentioned date he made a voluntary sale of the same; and at said date the said corporation was indebted to appellants in the sum of forty-four thousand five hundred dollars, for money before that time loaned and paid for said corporation, which sum it is alleged, was due and unpaid at the time when this action was commenced; and upon each of said shares there remains an unpaid balance of sixty dollars, amounting in the aggregate to eight thousand four hundred dollars, and for which amount appellants demand judgment in part satisfaction for the said debt due them from said corporation.

In this State there is a general law under which private corporations may be formed and organized for the purpose of carrying on any lawful enterprise, business or pursuit. When the capital stock of such corporation is subscribed, it may be fully organized by electing a set of directors, who become the trustees of its assets and property, for the use and benefit of its stockholders and creditors. Whenever required by the directors, it becomes the legal duty of the stockholders to pay to the treasurer of the corporation the amount of their stock subscribed, or whatever percentage thereof may be required, which constitutes its assets, to be used in the transaction of its business and in the payment of its debts.

Article XI, section 2, of the Constitution provides that "the stockholders of all corporations and joint stock companies

shall be liable for the indebtedness of such corporation to the amount of their stock subscribed and unpaid, and no more."

By this clause the individual liability of stockholders for the indebtedness of the corporation, is limited to the amount of their stock subscribed and unpaid. Whenever the full amount of their stock is paid into the corporation, they are discharged from any further personal liability to its creditors.

Section 14 of title 1, chapter 7, Miscellaneous Laws, Code, p. 527, "in relation to the formation of private corporations," is as follows: "All sales of stock, whether voluntary or otherwise, transfer to the purchaser all rights of the original holder or person from whom the same is purchased, and subject such purchaser to the payment of any unpaid balance due or to become due on such stock; but if the sale be voluntary, the seller is still liable to existing creditors for the amount of such balance, unless the same be duly paid by such purchaser."

Under this section the owner and holder of stock may sell and transfer all his rights therein to another, who thereby becomes liable for "the payment of any unpaid balance due or to become due on such stock; but if such sale is a voluntary one the seller is not discharged from his liability to existing creditors for the amount of any unpaid balance, unless the same be duly paid by such purchaser."

Thus it will be seen that while it is the legal duty of such purchaser to meet and respond to any calls duly made by directors of the corporation against the stock purchased by him, for any unpaid balance due or to become due thereon, the liability of the seller to existing creditors of the corporation is not discharged unless the same is duly paid by such purchaser; as to existing creditors, the liability of the seller appears to be a contingent one, and only becomes absolute upon the failure of the purchaser to pay any balance due or to become due thereon, when required by the directors of the corporation; or in other words, under this provision of the statute as to this class of creditors, the seller is made to occupy the relation of surety or guarantor to the purchaser.

Thus, we apprehend that it is not sufficient to constitute a cause of action against a stockholder who has made a voluntary sale of his stock, to aver that there is an unpaid balance due or to become due upon said stock which has not been paid,

but it should be further averred that said unpaid balance, although duly demanded or required by the properly authorized officers of the corporation to be paid, remains unpaid.

In this respect the complaint is defective and insufficient to constitute an action against respondent, for the reason that it fails to show that a demand has been duly made upon the purchasers of said stock by the directors of the corporation to pay the balance remaining unpaid upon the stock purchased of respondent.

But again, can the creditor of a corporation proceed in the first instance against a stockholder upon his individual liability without first having shown that he has exhausted his remedy against the corporation? We think not.

The contracts being made with the corporation, there is no privity of contract between creditors and stockholders. A stockholder is not presumed to be familiar with the dealings of the corporation. A demand might be presented to him for payment which had already been paid, or against which the corporation is entitled to credits or offsets. And if an action at law can be maintained by a creditor against a stockholder, in the first instance, he may be subjected to the cost and expense of several actions at once, by different creditors of the corporation.

But in the absence of any special and direct legislation as to how the individual liability of a stockholder may be enforced, we think it would be unreasonable, as well as unjust, to place any such construction upon the constitutional and legislative provisions heretofore referred to. For all that appears in the complaint, to the contrary, it may be that this corporation is not only engaged in carrying on its ordinary business for which it was organized, but entirely solvent and ready to pay off this demand of appellants upon presentation. No judgment is shown to have been obtained against the corporation, and a want of sufficient assets out of which it might be satisfied. Not even an application for its payment is alleged to have been made to the corporation.

The next question presented for our consideration is, whether the individual liability of a stockholder to existing creditors of the corporation may be enforced by an action at law, or whether a suit in equity must be resorted to. It is insisted by counsel for appellants that the remedy is at law, and to main-

tain the proposition, *Corning* v. *McCullough*, 1 Com. 47, *Simonson* v. *Spencer*, 15 Wend. 548, and *The Bank of Poughkeepsie* v. *Ibbotson*, 24 Wend. 473, are cited. We have examined those cases, and find that the statutes under which they were maintained are very different from ours. In *Corning* v. *McCullough*, the act of incorporation provides "That the stockholders * * * shall be jointly, severally and personally liable for the payment of all debts and demands contracted by the corporation, and that any person having any demand against such corporation may sue any stockholder or director in any court having cognizance thereof." In *Simonson* v. *Spencer* the language of the act is: "Any person having any demand against the said corporation may sue any stockholder singly, or any two or more stockholders jointly, and recover in any court having cognizance thereof." But upon the other hand we find that there are many cases in which it has been held that the remedy is in equity, where the rights of the corporation, the stockholders and creditors, can all be adjusted in one suit upon the principles of equality and justice. And as the views presented in those cases recommend themselves to our consideration as the most reasonable and appropriate, we have concluded to adopt them. The following authorities sustain this proposition: 19 Johns. 484; 8 Cow. 395; 20 Wall. 520; 14 Wis. 762; 1 Hopk. 305; 23 Pick. 112. In the last authority above referred to it was held that an action at law could not be maintained.

The court says: "If actions at law will lie, suits may be multiplied to an indefinite extent. Each bill holder or other creditor must have his separate suit, and each stockholder must be sued separately. Again, suits between stockholders to adjust their contributions would be interminable. If a creditor's demand be larger than the amount of stock owned by any one, he must have several suits against several individuals on the same cause of action or lose a part of his demand. If any one stockholder owned more stock than was needed to meet any one claim made upon him, he would be liable to several suits."

"It may happen, and probably has happened in this instance, that a bank owes more than the amount of its whole capital. In such case there must either be a *pro rata* division among the creditors of what may be recovered, which would be impracticable in suits at law, or those who sue first must recover

the whole of their debts, leaving others totally remediless, which would be palpably unjust. The evils and inconveniences of attempting to enforce this section by suits at common law would be incalculable, and such remedy would be inadequate, vexatious and mischievous. The only proper means of giving effect to this provision is by a process in equity, and this, of all cases which can arise, seems to call most loudly for a chancery jurisdiction."

"To a bill in equity, all persons, however numerous, might be made parties, and all the relative and conflicting claims of the many creditors and stockholders settled, and their proportionate rights to recover and liabilities to contribute adjudged in a single suit. We are all therefore of opinion that this case comes within the equity jurisdiction of the court, and that an action at law will not lie."

Being of opinion that the views expressed in the case above are correct, we adopt them as applicable to this case.

The decree of the court below dismissing the complaint with costs is affirmed.

FITZ v. BYNUM.

(55 California, 459. Supreme Court, 1880.)

[1] **Offer to return, necessary before contesting note given for stock.** In an action upon a note given for stock, the defense was that defendant was induced to execute the note by false and fraudulent representations that the value of the stock was great, whereas it was worthless. The court instructed the jury that if the stock had any value, the defendant must have offered to return it, or the plaintiff would be entitled to a verdict. The evidence was conflicting as to value, and the jury brought in a verdict for defendant: *Held*, that the instruction was correct, and the verdict conclusive.

Certain sales insufficient to fix market value. Sales of stock which operators could only induce their neighbors and acquaintances to take at uncertain and cheap rates, do not give market value to stock, but indicate an effort to give it an apparent market value.

Evidence of value of stock. The question being upon the value of certain mining stock at the time of its sale, the court properly excluded evidence going to the possible prospective value of the mines, *e. g.*, what it would cost to treat the ore if a stamp mill were put up at the mine.

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[1] *Thackrah* v. *Haas*, 119 U. S. 499; *Voorhes* v. *Earl*, 2 Hill, 288; 38 Am. Dec. 588; *Gifford* v. *Carrill*, 6 M. R. 588.

Appeal from a judgment for the defendant and from an order denying a trial in the Sixth District Court, County of Yolo: DENSON, J.

The question asked the witness McCleery (referred to in the opinion) was as follows:

"Question. You have stated that it would not pay to work ore that assayed $40 to $60 per ton, because you have to pay $15 per ton for milling; now, if the company were to put a mill at the mine, say a twenty or forty stamp mill, and proper machinery—hoisting machinery—upon the mine, could the ore not be worked for much less than $40 per ton?

The other facts are stated in the opinions.

J. C. BALL and J. W. ARMSTRONG, for appellant.

S. G. HARPER, for respondent.

MYRICK, J.

The jury rendered a verdict for defendant. Plaintiff moved for a new trial, which was denied, and plaintiff appealed.

Whether the stock, the sale of which was the consideration for the notes in suit, was of value, was a matter properly submitted to the jury; as to this issue, the evidence was conflicting; therefore the verdict of the jury will not be disturbed. The court clearly instructed the jury that if the stock had any value, the defendant must have offered to return it, or the plaintiff would be entitled to a verdict. The verdict, therefore, was necessarily based upon the belief on their part, from the evidence, that the stock had no value. The question of *market value* of the stock does not arise in this case. It does not appear that the stock had market value as such. The sales made appear to be only such as the operators could induce their neighbors and acquaintances to take, at prices ranging from fifty cents to a dollar a share, as purchasers could be found. As the witness Strong said, "The stock that I sold [10,000 shares] I sold for about six bits up to a dollar, ninety cents the most of it, and some at four bits, to elders and preachers. That I gave out of my own pocket to them.

I told them so at the time." Such transactions do not appear to us to give *market value* to the property sold; but, rather, transactions made in order to give an *apparent* market value. The price of one dollar per share placed on the stock by the trustees was altogether arbitrary.

It was not error in the court to sustain the objection to the question put to the witness McCleery, as to what the ore *might* have yielded under some other possible circumstances. The question in controversy was whether the stock had value as the mine then was.

Judgment and order affirmed.

SHARPSTEIN, J., and THORNTON, J., concurred.

BY THE COURT (in bank, on petition for rehearing):

This case was heard in department 2 of this court, and opinion filed August 18, 1880. Application is made that the case be heard by the court in bank. In addition to the facts stated in the opinion of the department, the transcript shows that the defendant, in his answer, alleged that the payee of the note in suit induced defendant to execute the note by fraudulent and false representations as to the value of the mine and its stock, and that the representations were made for the purpose of cheating and defrauding defendant; that he represented the mine and its stock to be of great value, and that $10,000 worth of ore was on the dump; whereas, in truth and in fact, the stock and mine were of no value. There was evidence given by the parties relating to this issue; the evidence was conflicting; the court properly instructed the jury regarding it, and the verdict is conclusive. Hearing in bank denied.

[1]IN RE SOUTH MOUNTAIN CONSOLIDATED MINING CO.

(7 Sawyer, 31; 5 Federal Rep. 403. U. S. District Court, District of California, 1881.)

General statement of the facts and proof necessary to fix personal liability upon a stockholder, with citation of the authorities by the court.

Liability of shareholders—Assessments of stock. A mining corporation organized under the statutes of California, issued to the former owners of the mining property a certain proportion of the stock and the balance was reserved as working capital. *Held*, that the stockholders incurred no liability, *ex contractu*, either express or implied, to pay in, either for the prosecution of the enterprise or the payments of the debts of the company, the nominal par value of their shares. *Held further*, that unless the stockholders subscribed for stock, or are the successors of subscribers, assessments levied on them can only be enforced by the sale of their shares.

Liability under Sec. 849 of California Code. By Section 349 of the Code of Civil Procedure of California, relating to the sale of delinquent stock, the stockholders are not personally liable for assessments unless from the terms of their subscription such liability was incurred.

Liability limited by statute. The remedy of the creditor against the stockholder personally is limited and defined by section 322 of the California Code, and his liability can not be extended beyond the limits therein prescribed.

Application for leave of assessment on shareholders of stock of a mining corporation.

JAMES A. WAYMIRE, for creditors.

MCALLISTER & BERGIN, for William Willis.

HOFFMAN, D. J.

At the request of counsel, I indicate the grounds for the denial of the application heretofore made to order an assessment to be levied on the shareholders of the above corporation. The assessment is asked for with the object of collecting the same by suits, *in personam*, against delinquent shareholders. The question whether they are personally liable must, therefore, first be determined. I do not question

[1] Approved, S. C. in Circuit Court, 14 Fed. 347.

the power of the court to compel contribution of unpaid subscriptions to the capital stock of an insolvent corporation for the purpose of paying its debts: *Upton* v. *Tribilcock*, 91 U. S. 48; *Sanger* v. *Upton*, Id. 60; *Chubb* v. *Upton*, 95 U. S. 665; *Pullman* v. *Upton*, 96 U. S. 328; *Turnbull* v. *Payson*, 95 U. S. 420; *Bank* v. *Case*, 99 U. S. 628; *Hatch* v. *Dana*, 101 U. S. 205. Nor do I deny that a promise to pay for shares of stock will be implied from the fact of subscribing for them: *Spear* v. *Crawford*, 14 Wend. 20; *H. & N. H. R. Co.* v. *Kennedy*, 12 Conn. 499; *Fry* v. *L. & B. S. R. Co.*, 2 Metc. (Ky.) 314; *Klein* v. *A. & S. R. Co.*, 13 Ill. 514; *Banet* v. *A. & S. R. Co.*, Id. 504. And the acceptance and holding of a certificate of stock will have the same effect: *Upton* v. *Tribilcock*, 91 U. S. 48; *Sanger* v. *Upton*, Id. 60. Nor is it necessary to create a liability as stockholder that a certificate shall have been issued: *Chaffin* v. *Cummings*, 37 Me. 76; *Chase* v. *Merrimack Bank*, 19 Pick. 564; *Silver* v. *Magruder*, 32 Md. 393; *Burr* v. *Wilcox*, 22 N. Y. 551; *Chester Glass Co.* v. *Dewey*, 16 Mass. 94. Payment of assessments will estop an unregistered transferee of shares from denying his liability as a shareholder. Serving as director, or voting at stockholders' meetings, will have the same effect: *Frost* v. *Walker*, 60 Me. 468; *M. & T. R. Co.* v. *Harris*, 36 Miss. 17; *Gaff* v. *P. & S. R. Co.*, 31 Pa. St. 489; *Hays* v. *P. & S. R. Co.*, 38 Pa. St. 81; *Harrison* v. *Heathorn*, 6 Man. & Gr. 81. The acceptance of an assignment of a certificate in blank will fix the liability as stockholder: *Upton* v. *Burnham*, 3 Biss. 524. If a subscription be obtained by fraud, it must be promptly repudiated: *Upton* v. *Tribilcock*, 91 U. S. 45; *Chubb* v. *Upton*, 95 U. S. 667. Nor will ignorance of the law relieve the stockholder: *Upton* v. *Tribilcock*, 91 U. S. 45. Nor can the corporation release the stockholder from his liability, so far as creditors are concerned; nor can it accept any other mode of payment than money, unless full value be given: *Sanger* v. *Upton*, 91 U. S. 60; *Troy Co.* v. *McChesney*, 21 Wend. 296; *Lake Ont. R. Co.* v. *Mason*, 16 N. Y. 459. The fact that the company may forfeit and sell the shares of a delinquent stockholder does not impair the rights of a creditor against him: Ang. & Ames on Corp., §§ 549–50; Thompson on Liab. of Stockh., § 193, and cases cited.

All these positions, which the counsel for petitioners have maintained in their able and elaborate brief, I concede. These principles apply to all cases where an obligation has been created or incurred on the part of the stockholder to pay to the corporation a certain sum, being the par value of the capital stock subscribed for or transferred to him. The liability thus created grows out of contract, express or implied, and the creditors of the corporation may avail themselves of it, as of any other *chose in action* or equitable assets of the corporation, on well-settled and familiar principles.

But the question in this case is: Does the acceptance of stock in a mining corporation, as they are usually formed in this State, create any obligation, either by contract or under the law, to pay to the corporation or to its creditors the nominal par value of the stock so accepted? The mode in which mining companies are formed in this State is familiar to us all. The owners of the property, or persons expecting to become such by complying with a few simple formalities, form themselves, with such others as they may take into the association, into a corporation, to which the property is conveyed. The amount of the capital stock, which is required to be stated in the certificate of incorporation, is usually fixed at a purely arbitrary sum, and divided into as many shares as convenience or caprice may dictate. It neither bears nor is intended nor supposed by the public to bear the slightest relation to the real value of the property—a value nearly always conjectural, and very often imaginary. It has recently become the practice to divide the capital stock into 100,000 shares of the value of $100 each, making $10,000,000 in all; a sum which, it is apparent, can have no reference to any estimate of the real or intrinsic value of what is usually a mere hole in the ground, supposed to afford favorable indications. A striking proof of this is afforded in the present case.

Among the first acts of the corporation was to place (in effect) 5,000 shares of their stock on the market at the price of one dollar per share. The organization having been effected and the property conveyed to the company, the stock is issued to the former owners, to the amount which may have been previously agreed upon. The remainder is reserved for working capital, or disposed of in the market for such prices as the value and prospects of the enterprise may justify. The

purchaser is, of course, careful to know into how many shares the stock is divided, but he is wholly regardless of the nominal and purely arbitrary par value attributed to the shares. No subscription paper, memorandum of association, deed of settlement, or other document, creating either expressly or impliedly any *ex contractu* obligation to take and pay for, at their nominal par value, any shares of stock, is signed by any of the shareholders. This general account of the mode of organizing mining companies in this State describes, with sufficient accuracy, what was done in the case at bar. The requirements of the statutes of this State with regard to mining corporations were strictly complied with. I am unable to perceive how any *ex contractu* obligation on the part of the shareholders to take and pay for their stock was created. It may be confidently affirmed that in no case of this description has such an obligation or liability been *intended* to be created. It has on all hands been supposed that the resources of such corporations were to be derived from the sale of reserved stock, or by levying assessments, with the power of selling delinquent stock. Creditors are protected by the personal liability of each shareholder for his *pro rata* share of the indebtedness of the corporation.

It was urged on the part of the stockholders that the shares held by them are to be treated as fully paid-up stock. I do not concur in this suggestion. It might have some plausibility in cases where all the stock has been distributed among the owners of the mine, in proportion to their respective interests; but where stock has been reserved, and subsequently sold at perhaps one-hundredth part of its nominal par value, it can in no sense be called or treated as fully paid-up stock.

But, even in the case of shares distributed among the mine owners, the view suggested seems to me inadmissible. It is a pure fiction. The mine owners do not, in fact, agree to take the stock and pay for it at its nominal par value, payment to be made by conveying the mining ground at a valuation extravagantly in excess of its real value. If they had really contracted any obligation to take and pay for the stock, they could not acquit themselves of it by such a device: *Sanger* v. *Upton*, 91 U. S. 60; *Troy Co.* v. *McChesney*, 21 Wend. 296; *Lake Ont. R. Co.* v. *Mason*, 16 N. Y. 459; *Wilson* v. *United*

Ins. Co., 14 John. 228; *Goshen Turnpk. Co.* v. *Hurtin*, 9 John. 217.

To call the stock fully paid up is to admit the obligation to take and pay for it, and to suppose that obligation to have been fulfilled in a mode the law will not permit. In my view no such obligation *ex contractu* was at any time created. If the liability to pay the nominal par value of the stock for the benefit of creditors exists, it must arise from the positive provisions of the statutes, and not from the contracts of the parties. This question I will now proceed to examine. The statutory provision by which this liability is supposed to be created is found in the 349th section of the Code of Civil Procedure. The previous sections of the article of the Code contain detailed and minute provisions regulating the levying of assessments; then to the sale of delinquent stock.

Section 349 provides that "on the day specified for declaring the stock delinquent, or at any time subsequent thereto, and before the sale of the delinquent stock, the board of directors may elect to waive further proceedings under this chapter, for the collection of delinquent assessments, or any part or portion thereof, and *may elect to proceed by action to recover the amount of the assessment and the costs and expenses already incurred, or any part or portion thereof.*"

It is this last clause which is supposed to create a legal liability on the part of the stockholders to pay assessments up to the par value of the stock, when necessary to satisfy the indebtedness of the corporation.

But to this view there are grave, and in my judgment, insuperable objections.

1. The statute does not, in terms, declare or create the liability. It merely authorizes the directors "to elect to proceed by action to recover the amount of the assessments." Its language would be satisfied by restricting its operation to those cases where such an action can be maintained; that is, to those cases where stock has been subscribed for, and an obligation assumed to take and pay for it. In the case of railroad, telegraph and wagon-road associations, the articles of incorporation are required to state that at least ten per cent. of the capital stock subscribed has been paid in, and no such corporation can be organized until subscriptions to its capital stock

have been obtained in a specified amount for each mile of the contemplated work, and ten per cent. of this amount must be paid in before the articles are filed. Sections 291, 292, 293, 294.

By section 290, the articles of incorporation must set forth "The amount of the capital stock and the number of shares into which it is divided." "If there is capital stock, the amount actually subscribed, and by whom."

These provisions are retained in the latest amendments to the Code, 1880. The only meaning I can attach to them is that the legislature contemplated two classes of corporations, in both of which the amount of so-called capital stock, and the number of shares into which it is divided, are required to be stated; but in only one of these classes the stock was supposed to be subscribed for, and an obligation incurred to take and pay for it. This latter class includes, as we have seen, railroad, wagon-road and telegraph companies, and banking, insurance, and other associations based on capital paid in, or agreed to be paid in. It is to this class that the clause giving the directors the right to elect "to proceed by action, to recover by action, the amount of the assessment" must, in my judgment, be deemed to refer.

2. The argument of the learned counsel for the creditors admitted that the liability contended for was limited to an amount equal to the par value of the stock held by the stockholders, and that it could only be enforced for the benefit of creditors. But if the construction of section 349, contended for, be sound, I fail to perceive on what grounds this limitation or restriction can be imposed.

Section 331 authorizes the directors of corporations to levy and collect assessments upon the capital stock for the purpose of *paying expenses, conducting business* or paying debts. The statute nowhere limits the aggregate of assessments that may be levied to the par value of the capital stock, and it has been held by the United States Circuit Court for this district, that an assessment may be levied upon the full-paid shares of a subscriber to stock in a bank, and his shares sold out if the assessment is not paid.

Section 349 confers, as we have seen, the right to proceed by action to recover any delinquent assessment, and if this

power be not restricted, as I have suggested, to cases wherein the stockholder has, by express or implied contract, agreed to pay, it will extend to all cases of assessments levied to meet expenses or conduct business, as well as to pay debts, and may be exercised against a stockholder who has paid his subscription in full, or who has already been assessed up to the par value of his stock. This result, startling and absurd as it is, seems to be the necessary consequence of the construction of section 349 contended for.

3. It will not be disputed that the ordinary rule which requires such a construction to be given to the provisions of a statute, as will make them consistent and harmonious, should be applied to the provisions of our code, with regard to corporations.

By section 322, as amended March 15, 1876, the individual liability of a stockholder of a corporation is limited to such proportion of its debts and liabilities as the amount of stock or shares owned by him bears to the whole stock of the corporation; and on payment of his proportion of any debt due from the corporation, incurred while he was a stockholder, he is relieved from any further personal liability for such debt.

I am unable to reconcile these provisions with a construction of section 349, which would give it the effect and operation contended for.

The court is asked to order an assessment to be levied, in order that the assignee in bankruptcy, representing the creditors, may collect by suit from the delinquent stockholders, an amount sufficient to pay the debts of this corporation up to the limit of the par value of the shares held by them.

The section just referred to, limits his personal liability for the corporate debts incurred while he is stockholder, to such proportion of those debts as the number of shares owned by him bears to the whole number of shares of the capital stock. But if he is personally liable on the assessment to be levied, he may be obliged, if he is the only solvent stockholder, to pay the whole amount of the indebtedness of the corporation, provided it does not exceed the fanciful and exaggerated par value mentioned in the articles.

If, as in the case at bar, the whole number of shares is 100,000, at $100 each, the stockholder who owns 1,000 shares

is liable for one one-hundredth part of the debts. If the aggregate indebtedness is $100,000, he acquits himself of all personal liability by the payment of $1,000. But if he is liable to the amount of the par value of his stock, he may be compelled to pay $100,000.

Will it be contended that a stockholder who has paid his full proportion of the debts incurred while he was a stockholder, would still remain personally liable to pay any assessment that may be levied, and that such a payment, which the statute declares shall relieve him from any further personal liability for such debts, and shall be a good defense in an action brought by a creditor, shall be unavailable in an action brought by an assignee in bankruptcy in behalf of creditors to collect an assessment levied for the payment of debts?

It seems to me that such a position is wholly untenable. I conclude, therefore: *First.* That the stockholders of mining corporations, organized as the corporation in this case was formed, incurred no liability *ex contractu*, either express or implied, to pay in, either for the prosecution of the enterprise or the payment of the debts of the company, the nominal par value of their shares. *Second.* That unless they have subscribed for stock, or are the successors of subscribers, assessments levied on them can be enforced only by the sale of their shares. *Third.* That section 349 does not create, and was not intended to create, any personal liability for assessments, unless from the terms of the stockholders' subscription such liability was incurred. *Fourth.* That the remedy of the creditor against the stockholder personally, is limited and defined by section 322 of the code, and his liability can not be extended beyond the limits therein prescribed.

THE COALFIELD CO. for use, etc., v. PECK.

(98 Illinois, 139. Supreme Court, 1881.)

Enforcing stockholders' personal liability; analogy to garnishee proceedings. Under section 8 of the act of 1872, entitled "Corporations," making stockholders liable to creditors of the corporation to the extent of their unpaid stock, to be proceeded against at the same time, as in cases of garnishment, it is not essential that a stockholder or stockholders should be proceeded against at the same time the suit is brought against the corporation, as in garnishee proceedings under the Attachment Act. The intention of the act is to give the remedy as ample and complete as in cases of garnishment known to the laws of the State, including the process after judgment.

[1] **Stockholder attacking judgment against corporation.** Under the act of 1872, making stockholders liable for unpaid stock to creditors of the corporation, a stockholder when sought to be made liable can not attack the judgment recovered against the corporation on the ground that it is collusive and unjust. If he can attack the judgment on that ground, he must do so in a court of chancery.

Practice on appeal—Finding facts. Where the judgment of the appellate court is made as the result, wholly, or in part, of a finding of facts different from the finding in the trial court, it is made the duty of the appellate court to recite in its final order, judgment or decree, the facts found by it. If it does not, and no error of law is found in the record of the trial court, a judgment of reversal by the appellate court will be erroneous.

Appeal from the Appellate Court for the Second District; heard in that court on appeal from the Circuit Court of Will County, the Honorable FRANCIS GOODSPEED, Judge, presiding.

Mr. George S. HOUSE and Mr. A. O. MARSHALL, for the appellant.

Messrs. COOPER, PACKARD & GURLEY, for the appellee.

Mr. Justice SHELDON delivered the opinion of the court.

On the 7th day of November, 1877, H. Leroy Thayer, for whose use this proceeding is prosecuted, recovered a judgment in the Will Circuit Court, against the Coalfield Coal Company,

[1] *Tunesma* v. *Schuttler*, 114 Ill. 156; *Moss* v. *Oakley*, 12 M. R. 1.

for $5,963.30, and an execution issued thereon having been returned "no property found," he, on the 27th day of December of the same year, sued out of said court a garnishee summons against Peck as a stockholder in said company.

Interrogatories were filed and answered by the garnishee, and, upon the hearing, judgment was rendered against the garnishee, which, upon appeal to the appellate court for the second district, was reversed, whereupon an appeal was taken to this court.

The liability which is attempted here to be asserted is under the 8th section of the act of 1872 (R. S. 1874, p. 287) entitled, "Corporations," which is as follows:

"Every assignment or transfer of stocks on which there remains any portion unpaid, shall be recorded in the office of the recorder of deeds of the county within which the principal office is located, and each stockholder shall be liable for the debts of the corporation to the extent of the amount that may be unpaid upon the stock held by him, to be collected in the manner herein provided. No assignor of stock shall be released from any such indebtedness by reason of any assignment of his stock, but shall remain liable therefor jointly with the assignee until the said stock be fully paid. Whenever any action is brought to recover any indebtedness against the corporation, it shall be competent to proceed against any one or more stockholders at the same time, to the extent of the balance unpaid by such stockholders upon the stock owned by them respectively, whether called in or not, as in cases of garnishment. Every assignee or transferee of stock shall be liable to the company for the amount unpaid thereon to the extent and in the same manner as if he had been the original subscriber."

The position which is taken by appellee is, that this proceeding in garnishment after judgment, which has been adopted in this case, does not lie at all under this 8th section; that the only garnishee proceeding meant by the statute is that of garnishment as in original attachment, and that the only way in which the stockholder can be proceeded against and subjected under this section is by suing out a summons against him at the same time the creditor's suit is instituted against the corporation. This construction is based upon the words "at the same time," which occur in the section in the

connection that "it shall be competent to proceed against any one or more stockholders at the same time," it being contended that these words, "at the same time," relate to the time of bringing any action to recover any indebtedness against the corporation, and are exclusive of all remedy otherwise than in the particular way of commencing proceedings against the garnishee at the same time suit is brought against the corporation. The appellate court sustained this view of the case.

We think the above a too contracted interpretation of the statute.

The statute declares, unequivocally, that "each stockholder shall be liable for the debts of the corporation to the extent of the amount that may be unpaid upon the stock held by him, to be collected in the manner herein provided," which is as we read it, "as in cases of garnishment."

Now, there were two modes known to our law by which, through garnishment, a debt owing by another to a judgment debtor might be reached and made subject by the judgment creditor to the payment of his judgment.

One is provided for in the act entitled "An act in regard to attachments in courts of record," where, in the special proceeding by attachment, there is included in the writ of attachment a garnishee summons to any one claimed to be owing a debt to the attachment debtor.

The other is in the act entitled "An act in regard to garnishment," where, when there has been a judgment obtained and an execution has been issued on it and returned "no property found," provision is made for the issue of summons against any person supposed to be indebted to the judgment defendant to appear as a garnishee, whereby any debt owing by him to the defendant in such judgment may be subjected to the payment of the judgment. The latter mode was the one pursued in the present case.

It is difficult to believe that in this 8th section of the Corporation Act, subjecting unpaid stock to a liability for the debts of the corporation, with provision for enforcing the liability "as in cases of garnishment," reference was had to the act in regard to attachments alone, and not at all to that distinctive statute entitled "An act in regard to garnishment"

and that instead of giving the remedy "as in cases of garnishment" it is to be construed as having been given as but in the one case of garnishment—that in an attachment proceeding; and that the garnishee process can be taken out only at the same time of the commencement of the suit against the corporation.

By the Corporation Act, stockholders are made liable for the debts of the corporation to the extent of their unpaid stock, the manner of its collection to be as in cases of garnishment. We think the intention was, to give the remedy full and ample as in cases of garnishment, and that the reasonable and true construction is, that the remedy is given to the full extent, as recognized in any case of garnishment known to our law. We regard it as a too narrow view, which would make this important remedy of the creditors of a corporation to rest upon the seemingly non-essential circumstance of the taking out of the process of garnishment at the same time the creditor commences his suit against the corporation.

It is suggested there was reason for a provision that the stockholder should only be liable as garnishee, where the garnishee process was issued at the same time of the creditor's suit against the corporation, as there would thereby be afforded an opportunity to the stockholder to see that defense was made to the claim preferred against the corporation. There could hardly be imputed to the legislature a purpose of such kind. Such a purpose would be at odds with the whole theory of the law of corporations.

The stockholder would have no control over the suit against the corporation. The corporation has its representative officers, who, in legal contemplation, are all-sufficient for the protection of the interests of the corporation. The justness of any particular claim for which suit should be brought against a corporation would form no element of the stockholder's liability. It would seem to be indifferent to him to whom he paid the amount of his unpaid subscription, whether to the creditor bringing any particular suit against the corporation, or to any other creditor, or to the corporation itself. His only concern would appear to be, that he should not have to pay his subscription for stock more than once.

To be sure, the words of the section, "at the same time"

create some ambiguity, whether they refer to the time when action is brought to recover any indebtedness against the corporation, or not. They do not, we think, necessarily refer to such time. They may be taken to refer to the procedure against the stockholders—that it shall be competent to proceed against any one or more stockholders at the same time; or they may perhaps be taken to refer to the same time of pendency of proceeding against the corporation, and not of the commencement of the suit against the corporation. And we are disposed to hold that they do not refer to the same time of the commencement of the suit, so as to make the taking out of a garnishee summons at that particular time essential to the remedy, which is given by the statute.

The judgment is reversed and the cause remanded.

Judgment reversed.

Mr. Justice SCOTT, dissenting.

Subsequently, upon an application for a rehearing, the following additional opinion was filed:

PER CURIAM.

This is an application by Peck, for a rehearing. The application must be denied.

When the case was considered we found that the circuit court had found the issues of fact against Peck, and rendered judgment thereon. The appellate court reversed this judgment, making no remanding order.

On examination of the record of the appellate court, we found that court did not "recite in its final order of judgment the facts as found" by that court. The statute provides that "if any such final judgment of the appellate court shall be made as the result wholly or in part of a finding of facts * * * different from the finding of the court from which the cause is brought," * * * it shall be the duty of such appellate court "to recite in its final order, judgment or decree, the facts as found."

In the absence of such recital this court could not properly decide the case upon the hypothesis suggested, that the judgment of the appellate court was founded, in any respect,

upon a finding of facts different from the finding in the court below. We therefore examined the questions of law found in the record of the circuit court and found no error therein.

Finding no error of law in the record of the circuit court, and no error of fact being shown in the only manner provided by law for showing the same, the judgment of the appellate court was necessarily reversed. A copy of the opinion of the appellate court was brought to our attention indicating that the appellate court did take a view of the facts different from the findings in the circuit court, and we were asked to affirm on that ground. We are not at liberty, in deciding a case, to look beyond the record, and hence could not properly consider the opinion of the court for such purpose.

We therefore remanded the cause to the appellate court without specific directions, leaving the case in such condition that the appellate court might take action in accord with the law as laid down by this court. If, when the case comes again before that court, the facts are held by the appellate court to be different from the finding in the circuit court, that court may of course found its judgment upon such different finding, and the facts so found in such case must be recited in the judgment. If the facts be found by the appellate court in accord with the finding in the circuit court, in such case the judgment of the circuit court should, of course, be affirmed by the appellate court.

It will thus be seen that our failure to pass upon the question relating to the alleged payment is no ground for a rehearing.

Again, a rehearing is sought upon the ground that (as is claimed) the judgment of Thayer against the coal company was collusive and unjust. This, too, is a question of fact. And as to the question whether Peck can be permitted, as garnishee, to attack that judgment, we think he can not; and if he can attack that judgment as a subscriber to the stock or as a shareholder, he must do that in a court of chancery.

Finding no sufficient reason for a rehearing the petition is denied.

Petition denied.

1. The property of a corporation is a part of its "capital stock." *Martin* v. *Zellerbach*, 38 Cal. 300.

2. "Share" and "certificate" distinguished: *Payne* v. *Elliot*, 14 M. R. —.

3. Measure of damages for the conversion of stock: *Bowker* v. *Goodwin*, 10 M. R. 149.

4. Purchase and sale of stock by directors, instead of issue and sale as voted by stockholders: *Crump* v. *U. S. M. Co.*, 3 M. R. 454.

5. Case in which stock was held to be an interest in lands within the Statute of Frauds: *Boyce* v. *Greene*, 1 Batty, 608.

6. An assignment or transfer of a certificate of stock in a corporation, whether as collateral, or in case of absolute sale in the absence of any legislative enactment, passes the title to the assignee, and is valid against creditors of the assignor without transfer upon the books of the company or notice to the corporation: *Cormick* v. *Richards*, 3 B. J. Lea (Tenn,) 1; see also, *De Comean* v. *Guild Farm Oil Co.*, 3 Daly, 218.

7. Organization of corporation dependent upon subscription of stock: *Coyote Co.* v. *Ruble*, 4 M. R. 88.

8. Creation of preference shares not enjoined: *Bill* v. *Sierra Nevada M. Co.*, 7 M. R. 413.

9. Defense of fraud to action for calls: *Glamorganshire Co.* v. *Irvine*, 6 M. R. 565.

10. A refusal to issue stock rightfully claimed, amounts to a conversion by the corporation: *Bond* v. *Mt. Hope Co.*, 14 M. R. —.

11. Contract by incorporated company to sell shares of its own stock for less than par, enforced: *Otter* v. *Brevoort Co.*, 50 Barb. 247; 36 How. Pr. 330.

12. The holders of shares which, by agreement, are to be paid for in mines, the agreement being accepted and the land in possession of the company, must be considered as the holders of paid-up shares: *In re Bosworthen M. Co.*, L. R. 6 Ch. App. 48.

13. Warranty that stock shall be free from incumbrance, construed: *Williams* v. *Hanna*, 40 Ind. 535; *Post* WARRANTY.

14. In stock transactions, quantity, not identity of shares, is the material matter: *Boylan* v. *Huguet*, 14 M. R. —; *Hardenbergh* v. *Bacon*, 1 M. R. 352.

15. Parol evidence allowed to show that the next dividend was not included in the sale of stock: *Brewster* v. *Lathrop*, 2 M. R. 552.

16. Effect of adding the word "trustee" after the name of the person to whom the stock is issued: *Brewster* v. *Sime*, 14 M. R. —; *Thompson* v. *Toland*, 2 M. R. 77; *Shaw* v. *Spencer*, 100 Mass. 382.

17. Action for fraudulent over-issue of stock: *Bruff* v. *Mali*, 6 M. R. 574.

18. Rule of division of its own shares purchased by a company, among its stockholders: *Coleman* v. *Columbia Co.*, 3 M. R. 483.

19. A broker may not make a profit on stock purchases over and above his commissions: *Day* v. *Holmes*, 2 M. R. 276.

20. As to stockholders' rights to inspect books, see *Ex parte Deidesheimer*, 8 M. R. 41.

21. Matters to be proved in action to enforce personal liability based on the issue of stock at an over-valuation: *Douglass* v. *Ireland*, 4 M. R. 32.

22. A chattel mortgage may be given upon shares of stock: *Ede* v. *Johnson*, 15 Cal. 53.

23. Construction of California Constitution attempting to regulate stock issues: *Ewing* v. *Oroville Co.*, 56 Cal. 649.

24. Stock owned by the corporation itself, how voted: *Farwell* v. *Houghton Copper Works*, 8 Fed. 66.

25. The power to sell the corporate property resides in the board of trustees, not in the stockholders: *Gashwiler* v. *Willis*, 3 M. R. 516.

26. Measure of damages in suit by broker against his employer: *Giddings* v. *Sears*, 2 M. R. 281.

27. The fact that its mines are valueless does not necessarily make the stock of the company worthless: *Gifford* v. *Carvill*, 6 M. R. 558.

28. Contract made with stockholders treated as contract of the company: *Gordon* v. *Swan*, 3 M. R. 84.

29. Rights of the assignee of stock against a corporation. He is not bound to show the title of his vendor: *Holbrook* v. *New Jersey Zinc Co.*, 57 N. Y. 616.

30. Partner liable for conversion of stock by co-partner: *Hixon* v. *Pixley*, 11 M. R. 555.

31. Measure of damages for failure to deliver stock: *Huntingdon Co.* v. *English*, 10 M. R. 233.

32. Preference to certain stockholders by classification of the stock: *Kent* v. *Quicksilver Co.*, 4 M. R. 47.

33. Where rescission of stock contract is sought, a return of the stock must be tendered within a reasonable time: *Leaming* v. *Wise*, 7 M. R. 41.

34. An agent to buy stock, can not be the seller: *Marye* v. *Strouse*, 2 M. R. 204.

35. The entries in the corporate books are *prima facie* evidence that the parties named are stockholders, but parol proof is admissible that such parties refused to accept the stock: *Mudgett* v. *Horrell*, 33 Cal. 25.

36. Where the property of a corporation consists partly of the property of a previous joint stock association and partly of property contributed by corporators not connected with the previous association, the corporation will not be liable for the debts of the old association, but the stock of the old association will be: *Paxton* v. *Bacon Co.*, 3 M. R. 512.

37. A stockholder in one of two companies, which are afterward consolidated under the statute, becomes a stockholder in the new company: *People* v. *Minong M. Co.*, 33 Mich. 2.

38. Whether the release of a stockholder from liability on corporate debts will release the corporation, see *Prince* v. *Lynch*, 38 Cal. 528.

39. The issue of stock to pay for constructing a railroad may not be questioned where regular, though the railroad is not built and the company may be entitled to return of its stock: *Savage* v. *Ball*, 2 M. R. 579.

40. A party will be enjoined from disposing of stock if the injury to plaintiff would thereby become irreparable: *Sierra Nevada Co.* v. *Sears*, 7 M. R. 549.

41. The proper remedy for a party claiming to be the owner of certificates of stock which the trustees refuse to issue to him, is by action against

the corporation for value of the stock claimed: *State* v. *Guerrero*, 9 M. R. 660.

42. In California, mining stock properly indorsed passes by delivery: *Thompson* v. *Toland*, 2 M. R. 77.

43. Specific performance of agreement to transfer stock, not enforced: *Treasurer* v. *Commercial Coal Co.*, 13 M. R. 360.

44. For conditions precedent to right to forfeit stock, see *Westcott* v. *Minnesota Co.*, 6 M. R. 336.

45. For a case in which a corporation was estopped from denying ownership of stock, see *Mandlebaum* v. *North American M. Co.*, 5 M. R. 506.

46. *Bona fide* purchaser of stolen stock acquires no title against real owner: *Barstow* v. *Savage M. Co.*, 64 Cal. 388; 49 Am. R. 705.

47. Certificates of stock are not negotiable instruments; where *bona fide* purchaser claims title, based upon negligence of the owner, he must show that such negligence was the proximate cause of his innocent purchase: *Id.*

48. Rights of pledgor and pledgee of stock: *Hayward* v. *Rogers*, 62 Cal. 348.

49. The innocent holder of stock indorsed in blank has title as against the true owner who had transferred them to a bank as collateral: *Gass* v. *Hampton*, 16 Nev. 185.

50. An assessment is not void because necessitated by previous misapplication of funds: *Marshall* v. *Golden Fleece Co.*, 16 Nev. 156.

51. Telegraph company liable only for nominal damages on delayed cipher telegram instructing sale of stock: *Mackay* v. *Western Union Tel. Co.*, 16 Nev. 222.

52. Assessment book of company as evidence of ownership of stock: *Abernathie* v. *Con. Virginia Co.*, 16 Nev. 261.

53. Person receiving gift of stock for purpose of becoming a trustee becomes a stockholder, and as such, eligible to the office: *State* v. *Leete*, 16 Nev. 242.

54. Stockholder to sue his corporation in equity must state facts showing his *bona fides*, *status*, etc.: *Taylor* v. *Holmes*, 14 Fed. 499.

55. Rights of stockholders voluntarily assuming to become personal indorsers for the company: *Farmers Bank* v. *Hannon*, 14 Fed. 593.

56. An assessment may be garnished: *Faull* v. *Alaska Co.*, 14 Fed. 657.

57. Where stock deposited as collateral is sold, the proceeds effect payment although the borrower had refused to ratify the sale: *Ross* v. *Moses*, 1 Com. B. 227.

58. By-laws can not create liens on stock: *Anglo-Cal. Bank* v. *Granger's Bank*, 63 Cal. 359.

59. A transfer of stock discharges all equities between the seller and the company of which the buyer was ignorant. *Id.*

60. An officer when he sells all his stock ceases to be such officer: *Orr Co.* v. *Reno Co.*, 17 Nev. 170.

61. Unless the right is conferred by the charter or the by-laws, stockholders can not vote by proxy: *Com.* v. *Bringhurst*, 103 Pa. St. 134; 49 Am. R. 119.

WILLIAMS v. GROUCOTT ET AL.

(4 Best & Smith, 149; 116 Eng. Com. Law, 149. Court of Queen's Bench. 1863.)

[1] **Mineral owner bound to ware his pits against surface owner's cattle.** A person entitled to the minerals under the land of another, with license to make a mine-shaft opening into it, is, in the absence of any stipulation to the contrary, under a legal obligation to the owner of the surface soil to fence the shaft, so as to prevent its being a source of danger to his cattle which may be upon it; and is liable to an action for injury accruing to those cattle for want of such fencing.

Case on appeal from the County Court of Flintshire, holden at St. Asaph, to recover the sum of £50 damages, sustained by the plaintiff, for that, on the 23d October, 1861, a cart mare of the plaintiff fell into a mine-shaft of the defendants, in a certain field on Isglan Farm, in the parish of Cwm, in the county of Flint, in the occupation of the plaintiff, and was killed, and which mine-shaft had been improperly and negligently fenced off from that field.

The case was tried before the deputy judge of that court and a jury.

The plaintiff, in his evidence, stated that the defendants worked the minerals under the Isglan Farm. About three years before the commencement of the action a mine, pit or shaft had been constructed by them in Yr Acre, a field which was part of that farm. About a year after its construction the mouth of the shaft had been closed by the defendants in the following manner: Branches of trees were placed across the shaft, and either a mound of stones forming a solid arch, without mortar, or a hollow arch of stone, without mortar, was built upon or over the mouth of the shaft. At the time when the shaft was thus covered over, the defendants' agent stated that he did not know when he should receive notice from the defendants to re-open the shaft.

Prior to the 23d October, 1861 (the day in question), the shaft had been so dealt with that on that day the only fence over it was the branches over the mouth with some stones

[1] *Lower Macungie* v. *Merkhoffer*, 71 Pa. St. 276.

lying upon them. Evidence was given for the plaintiff, that this alteration in the fence of the shaft had been caused by the defendants' workmen, who were stated to have come in the course of the summer of 1861, with horses and carts, to the shaft, and to have removed the windlass posts therefrom, and in the course of so doing to have pulled down the arch of stone originally placed over the mouth of the shaft. There was no positive evidence that the defendants had directed or sanctioned the removal of the windlass posts. The plaintiff, in his evidence, stated that prior to the removal of the windlass posts from the shaft, the defendants' agent gave him permission to remove stones from the shafts on the Isglan Farm for his own purposes, and that such stones were removed from the sides of the shaft in Yr Acre Field before the time of the removal of the posts. There were two shafts on the farm, but only one in Yr Acre Field.

The mare, the subject of the action, had, with other horses of the plaintiff, been turned into Yr Acre Field to graze on the evening of the 23d October, 1861, and on the ensuing morning was found dead at the bottom of the shaft in that field. She appeared to have fallen through the timber placed on the mouth of the shaft.

It did not appear whether the commencement of the occupation of the Isglan Farm by the plaintiff was prior or subsequent to the commencement of the possession of the minerals under the farm by the defendants.

The jury found specially:

1. That the pit was not in the first instance properly and effectually covered as a protection against horses.

2. That the defendants did, by acts of theirs, cause alterations in the security of the pit so as to render it unsafe as against horses.

3. That there was no neglect on the part of the plaintiff on the evening of the 23d October, 1861, in turning out his horses without seeing that the pit was secure as against horses.

4. That the plaintiff himself did not affect the condition of the pit by removing stones from its mouth.

5. That the defendants were in possession of the shaft at the time of the accident to the mare.

6. That the plaintiff was in possession of Yr Acre Field at the time of the accident.

7. That there was no evidence of the stones having been removed from the pit at all by parties other than the plaintiff and the defendants.

Thereupon, by direction of the deputy judge, the jury found their verdict for the plaintiff, and assessed the damages at £40.

On this verdict judgment was given in the county court for the plaintiff, several questions being reserved for the opinion of this court, and among them the following:

"Does the point of law raised for the defendants that, 'in the absence of stipulation, the owner of minerals who has easements over the surface is not bound to fence or protect disused shafts for the benefit of surface tenants, and certainly not to maintain or repair such fences,' afford any ground for disturbing the verdict in this action?"

M'INTYRE (J. I. WILLIAMS with him), for the defendants.—The judgment of the county court was erroneous. Unless by special stipulation, the person who has a right to sink a mine-shaft is under no duty to fence it as against the person to whom the surface land belongs. He who has a right to dig a pond or well in the field of another must be taken to have a right to use the land for that purpose as if it were his own; and those who are in the occupation of land are not bound to fence holes in it against anybody.

[BLACKBURN, J.—He who makes or maintains what is dangerous ought to take reasonable precaution to prevent mischief from it; the general rule being that a man should so use his own as not to hurt others. In *Blyth* v. *Topham*, Cro. Jac. 158, where a man dug a pit in a common, by occasion whereof the mare of another, which was straying, fell into the pit and perished, it was held that no action lay, because the mare had no right to be there.]

There is no case precisely in point to the present, but *Hounsell* v. *Smyth*, 7 C. B. N. S. 731, has a bearing upon it, for that case shows that an owner of land is under no legal obligation to fence an excavation therein, unless it is made so near a public road or way as to constitute a public nuisance. [BLACKBURN, J.—In *Sybray* v. *White*, 1 M. & W. 435, it seems to have been assumed, rather than decided, that where a horse was killed by falling down an old mine-shaft, which had not

been sufficiently covered over, the possessor of the shaft was liable to the owner of the horse.] The present case is more like *Southgate* v. *Stanley*, 1 H. & W. *247, where the plaintiff had been invited into a hotel as a visitor by the defendant, and when leaving, it was necessary for the plaintiff to pass through a glass door, which, being in an insecure state through the neglect of the defendant, some of the glass fell on the plaintiff and injured him, and it was held that the defendant was not liable. Here the plaintiff was aware of the danger from the shaft when he turned his mare into the field. Suppose the surface land was in the occupation of the owner in fee, who had demised the minerals to the defendants; would an action have lain at the suit of the owner in fee? and if not, why should this plaintiff, to whom the surface land has been demised, be in a better position? If the defendants are liable to an action at all, it must be at the suit of the owner in fee, and not of the plaintiff, who, however, might have a right to sue the latter for not getting from the defendants a stipulation for the proper fencing of the shaft.

J. BROWN, for the plaintiff.—The person who has a right to sink a mine-shaft in the land of another, lies under an obligation to the owner of the soil to take reasonable precaution to fence that shaft, so that it may not become a source of danger to animals which are lawfully upon the surface. It is but just that he who derives benefit from the shaft should protect others against injury arising from it, and accordingly it is customary through the country to keep such things securely fenced. One or other of these parties is bound to fence the shaft in order to prevent mischief, and it is not reasonable that the plaintiff should do it, as he can not know whether the defendant will use it again, or what convenience he requires at the pit's mouth, nor whether he wants the shaft for air or otherwise. [He referred to "The Derbyshire Mining Custom and Minerals Courts Act, 1852 (15 & 16 Vict. c. CLXIII), Sect. 65 and Schedule A, Art. 5.] The defendants did worse than leave a shaft unfenced, for, by making an imperfect fence, they, as it were, set a trap for the cattle to bring them into danger. If a man digs a pit in a place over which another has a right of way, it is a nuisance not only to him but also to the public.

Blythe v. *Topham*, Cro. Jac. 158, is an authority, and is rec-

ognized as such in *Hounsell* v. *Smyth*, 7 C. B. N. S. 731, but is not precisely in point, as the mare there was trespassing. In *Humphries* v. *Brogden*, 12 Q. B. 739, it was held that where the surface of the soil is in one person and the ownership of the minerals in another, the former is of common right entitled to support from the subjacent strata, and if the owner of the minerals removes them, it is his duty to leave sufficient support for the surface in its natural state; and it is no answer that the mines are worked carefully and according to custom. *Barnes* v. *Ward*, 9 C. B. 392, shows that the person who makes an excavation on his premises adjoining an immemorial public way which renders it unsafe to those who use it with ordinary care, is guilty of a public nuisance, even though the danger consists in the risk of accidentally deviating from the road, and although the injured persons are trespassers on his land. See *Binks* v. *The South Yorkshire Railway and River Dun Company*, 3 B. & S. 244. The law of England on this subject is in accordance with the law of Moses: "If a man shall open a pit, or if a man shall dig a pit, and not cover it, and an ox or an ass fall therein, the owner of the pit shall make it good, and give money unto the owner of them; and the dead beast shall be his."—Exod. XXI, 33–4.

MCINTYRE, in reply.—The doctrine of the Mosaic law which has been cited is not in point, and, if it were, it has not been adopted by the law of this country. It is sought to put this case on the footing of those decided upon rights of way; but where the act done amounts to a nuisance to a public right of way, and consequently is a public nuisance, the action will lie; and it is not like the cases on private rights of way; besides here what was done by the defendants was done by them under a license. The other side allege that it is usual throughout the country to fence mine-shafts, but it is not stated by whom this is to be done; and such is not the practice in Wales where this accident happened. The defendants have no right to go on the land of the plaintiff for the purpose of making a fence to their own shaft. [COCKBURN, C. J.—They must go on the land of the plaintiff in order to make the shaft itself.] No, they might drive it up from below.

COCKBURN, C. J.

Our judgment must be for the plaintiff. The question is certainly a nice and also a novel one, namely, whether, when a mine has been severed from the ownership of the surface soil, with license to the owner of the mine to sink a shaft through the surface, it is incumbent on him to protect the owner of the surface against injury to his cattle by reason of the shaft, or whether it rests with the owner of the surface to protect them against it himself. On this subject there is no positive law, or statutory enactment, or mining custom, and in the actual case there is no stipulation as to the duty of fencing the shaft. On the one hand the owner of the surface may say to the owner of the minerals: "You have had license given you to dig this shaft; still it is incumbent on you to fence it, for it is a reasonable thing to impose upon you the duty of seeing that no injurious consequences beyond the loss of so much soil shall accrue to me in consequence of it." On the other hand, the man who sinks the shaft may say: "In making this shaft I did no more than I was given a right to do; and if, in consequence of that, dangerous consequences are likely to arise to your cattle on the surface, it is for you to guard against them." And the question is, whether the man sinking the shaft is entitled to make that answer, or is he under an implied obligation to fence the shaft? I am of opinion that it is more reasonable to expect that the man whose act produces the danger should do all that is reasonably necessary to prevent injurious consequences to the owner of the surface soil, who does not know that a shaft will be sunk, or, if so, when or where it will be sunk. The decision of the county court in favor of the plaintiff must therefore stand.

WIGHTMAN, J.—I am considerably surprised that so little authority has been cited on this occasion; for, if there had been any more bearing on the subject, I have no doubt the counsel would have discovered it. I quite agree with the judgment of my Lord Chief Justice; but I can not help making this further remark, that it appears to me that the fact that the defendants erected a fence in the first instance over the mouth of this pit is evidence of an admission on their part of a liability, from whatever cause arising, to fence that pit.

BLACKBURN, J.—The question here is not whether a person whose cattle had no right to be on land can maintain an action for digging a shaft in it by which they receive injury; if it were, the point is decided, and I think rightly, by *Blyth* v. *Topham*, Cro. Jac. 158, *Barnes* v. *Ward*, 9 C. & B. 392, and *Hounsell* v. *Smyth*, 7 C. B. N. S. 731, which establish that as against him the owner of the shaft was under no obligation to fence it. But here the plaintiff is owner of the surface-land, and the defendants are owners of the minerals under it, to get at which they have made this shaft. We have no evidence of title on either side, and therefore, as in *Humphries* v. *Brogden*, 12 Q. B. 739, we must take it that the right to the surface and the right to the mine have been severed without further stipulation. Now, looking at the general rule of law that a man is bound to use his property so as not to injure his neighbor, it seems to me, that when a party alters things from their normal condition so as to render them dangerous to *already acquired* rights, the law casts on him the obligation of fencing the danger, in order that it shall not be injurious to those rights. There are cases which establish such a principle where public rights have been interfered with: for instance, those which establish that where a cut has been made through a highway the person making it is bound to build and maintain the bridge, respecting which there are several authorities in the Year Books, that have, I believe, been acted on in modern times in questions relative to the Bedford Level; see 1 Rol. Abr. 368; *R.* v. *The Inhabitants of Kent*, 2 Mau. & S. 513; *R.* v. *Kerrison*, 3 Id. 526, and the record of *Stratford Bridge Case*, P., 6 Ed. 2, there referred to, p. 520; and the same principle applies to *private* rights.

It is very singular that there should be such an absence of authority on this matter. The only case like the present is *Sybray* v. *White*, 1 M. & W. 435, where the law as I have stated it was taken for granted in the declaration, and also by the parties at the trial, as well as afterward by the counsel in the argument and the court in giving judgment. It is perfectly true that the point may have passed without consideration, but still the case is so far an authority; and very eminent judges sat in the Exchequer at that time.

Judgment for the plaintiff.

1. License to dig minerals in granted lands where the minerals are reserved out of the grant, will not justify an injury to the surface: *Gesner* v. *Cairnes*, 2 Allen (N. B.) 595.

2. Injury to surface authorized by statute giving such preference to the owner: *Gill* v. *Dickinson*, L. R., 5 Q. B. Div. 159.

3. The expression "surface damage" as used in an act regulating the workings of mines in the Forest of Dean, construed to include damage done to the surface by reason of the working under it: *Allaway* v. *Wagstaff*, 4 H. & N. 307.

4. The word "soil," in an inclosure act, *held*, to mean "surface." *Pretty* v. *Solly*, 8 M. R. 301.

5. Injury to the surface by subsidence, although the lessees worked in accordance with the stipulations of their lease, leaving the pillars therein mentioned standing, *held*, that the lessees were not liable: *Eadon* v. *Jeffcock*, L. R., 7 Exch. 379.

See SURFACE SUPPORT.

PARTRIDGE v. SCOTT ET AL.

(3 M. & W. 220. Court of Exchequer, 1838.)

[1] **Building on undermined lot, has no claim to support from adjoiners.** If a party builds a house on his own land, which has previously been excavated to its extremity for mining purposes, he does not acquire a right to support for the house from the adjoining land of another—at least until twenty years have elapsed since the house first stood on excavated land and was in part supported by the adjoining land, so that a grant by the owner of the adjoining land, of such right to support, may be inferred.

Idem—No grant presumed against party both ignorant and innocent. Rights of this sort can have their origin only in grant, and, *semble*, such grant ought not to be inferred until after the lapse of twenty years since the owner of the adjoining land knew or had the means of knowing that the land had been so excavated.

Adjoiner not liable for subsidence. The owner of the adjoining land is not liable to an action on the case, if, within such period, he works mines under his own land so near its boundary as to cause the excavated land on which the house stands to sink, and the house to be thereby injured.

Action on the case. On the trial before ALDERSON, B., at the Summer Assizes for Staffordshire, in 1834, the jury found a verdict for the plaintiff, subject to the opinion of the court on the following case.

The declaration contained three counts. The first stated that the reversion of certain messuages, dwelling-houses, out-houses, yards, gardens, and closes, with the appurtenances, belonging to the plaintiff, the defendants, on the 1st day of January, 1830, and on divers other days and times, etc., so wrongfully, carelessly, negligently and improperly, and without supporting or propping up the same, worked certain mines near to the said premises, and dug for, got, and removed the mines, minerals, and other produce of the said mines, to the support of which said mines and minerals for his said premises the plaintiff was entitled, and which he of right ought to have had; and that, by reason thereof, and by and through the carelessness and improper conduct of the defendants, the foundations of the plaintiff's said premises were thereby greatly weakened and

[1] *Moody* v. *McClelland*, 39 Ala. 45; 84 Am. Dec. 770; *Charless* v. *Rankin*, 22 Mo. 566; 66 Am. Dec. 642.

injured, and the ground on which the same stood swagged and gave way, and the walls, foundations, roofs, ceilings, joists, doors, and windows of the buildings on the plaintiff's said premises, and the earth and soil of the said premises, were shaken, displaced, rent asunder, damaged, and spoiled, and sunk and fell; and the said buildings were in great danger of falling down, and the said premises were thereby unfit for habitation or use, or cultivation respectively; and that the plaintiff had been put to great expense in repairing and endeavoring to repair the same, etc.

The second count referred to a certain other messuage, house, yard, garden, close, and premises, in the occupation of the plaintiff, and was in all other respects similar to the first count. The third count was in trover for certain goods and chattels, to wit, earth, soil, rubbish, etc.

To this declaration the defendants pleaded separately, but the same pleas; that is to say, they pleaded, first, to the whole declaration the general issue of not guilty.

Secondly, as to the working without supporting or propping up the mines in the first count mentioned, near to the messuages, dwelling-houses and out-houses of the plaintiff in that count mentioned, that the plaintiff was not entitled to, nor ought he of right to have had, the support of the mines for his said messuages, dwelling-houses and out-houses, in the first count mentioned, nor any nor either of them, nor any part thereof, etc.

Thirdly, a similar plea as to working without propping up the mines in the said first count mentioned, near to the yards, gardens, closes, etc., in that count mentioned.

Fourthly, a similar plea as to working without supporting the earth, soil, ironstone, coals, and materials, near to the messuage, dwelling-house and out-houses, in the second count mentioned.

Fifthly, a similar plea as to the working without supporting the earth, soil, ironstone, coal, and materials, near to the yard, garden, close and premises, in the said second count mentioned. And sixthly and lastly, to the count in trover, that the plaintiff was not possessed of, as his own property, the said goods and chattels in that count mentioned.

The replication took the issues tendered in the above mentioned pleas.

The jury found that the plaintiff was possessed of a certain dwelling-house and premises partly erected upon excavated land within four years before the injury complained of, being the house and premises to which the second count of the declaration referred, and of other houses, land and premises, the buildings on which had been erected about thirty years before, and which were those included in the first count.

They also found that the defendants excavated so near their own boundary, (the direction of which boundary was east and west,) the mines belonging to themselves, as to cause damage thereby to all the plaintiff's premises, and to cause the adjoining land of the plaintiff, not covered with buildings, to sink also. The defendants began to work their mines after the new house and buildings of the plaintiff had been finished. They sunk their shaft or pit about one hundred yards from the plaintiff's premises on the south side thereof, and worked the coal northward toward those premises.

The jury also found, that, in order to have prevented any injury from the defendants' works to the plaintiff's premises, a rib of coal ought to have been left between those parts of the substrata over which the plaintiff's buildings and premises were situated, and the works of the defendants, at least twenty yards in thickness. That the defendants worked their mines, leaving a rib of coal in these places of less than ten yards in thickness, and that they were aware that the coal had been worked out some years before on the north or plaintiff's side of their boundary, where the boundary adjoined the plaintiff's premises. That in so doing the defendants were guilty of negligence in not leaving a rib of sufficient thickness, if the plaintiff was entitled to support from the defendants' land and substrata. The court are to be at liberty to draw any reasonable conclusion that the jury should have drawn.

The question for the opinion of the court is, whether, under the above circumstances, the plaintiff is entitled to recover. And if he is, then whether he is entitled to damages for the old houses and land alone, or for the more recent erections also. And it is agreed that the amount of damages shall be settled by arbitration, upon whichever principle this court may direct.

If the court shall be of opinion that the plaintiff is not entitled to recover, then a nonsuit or verdict for the defendants, as the court may direct, is to be entered.

The case was argued at last Trinity term by W. J. ALEXANDER for the plaintiff and WHATELEY for defendants, and the judgment of the court was delivered at Trinity term, 1838, by ALDERSON, B. The two questions in this case are of considerable importance. The facts may be shortly thus stated: The plaintiff was possessed of two houses, one an ancient one, and the other built long within twenty years, before the subject of the present action occurred. These houses were built on the plaintiff's land, and considerably within his boundary; and the modern house is stated to have been built on land which had been previously excavated for the purpose of getting coal.

No such statement appears in the case as to the ancient house; and the court can not therefore intend that that house was built originally on excavated land, or that the land has been excavated more than twenty years ago.

Under these circumstances, the question is precisely similar as to both houses, and is one on which the court do not entertain any doubt.

Rights of this sort, if they can be established at all, must, we think, have their origin in grant. If a man builds his house at the extremity of his land, he does not thereby acquire any right of easement, for support or otherwise, over the land of his neighbor. He has no right to load his own soil so as to make it require the support of that of his neighbor, unless he has some grant to that effect. *Wyatt* v. *Harrison*, 3 B. & Ad. 871, E. C. L. R. Vol. 23, is precisely in point as to this part of the case, and we entirely agree with the opinion there pronounced.

In this case, if the land on which the plaintiff's house was built had not been previously excavated, the defendants might, without injury to the plaintiff, have worked their coal to the extremity of their own land, without even leaving a rib of ten yards, as they have done. And if the plaintiff had not built his house on excavated ground, the mere sinking of the ground itself would have been without injury. He has, therefore, by building on ground insufficiently supported, caused

the injury to himself, without any fault on the part of the defendants, unless at the time by some grant, he was entitled to additional support from the land of the defendants. There are no circumstances in the case from which we can infer any such grant as to the new house, because it has not existed twenty years; nor as to the old house, because, though erected more than twenty years, it does not appear that the coal under it may not have been excavated within twenty years; and no grant can at all events be inferred, nor could the right to any easement become absolute, even under Lord Tenterden's Act, until after the lapse of at least twenty years from the time when the house first stood on excavated ground and was supported in part by the defendant's land.

If the law stood as it did before Lord Tenterden's Act, (2 and 3, Will. 4, c. 71, s. 2,) we should say that such a grant ought not to be inferred from any lapse of time short of twenty years after the defendants might have been or were fully aware of the facts. And even since that act, the lapse of time, under these peculiar circumstances, would probably make no difference. For the proper cónstruction of that act requires that the easement should have been enjoyed for twenty years under a claim of right. Here neither party was acquainted with the fact that the easement was actually used at all, for neither party knew of the excavation below the house. We should probably therefore have been of opinion that there was no user of the easement under a claim of right and that Lord Tenterden's Act, therefore, would not apply to a case like this. However, the facts of this special case do not raise that point.

We think, upon the whole, that the defendants are entitled to our judgment.

Judgment for the defendants.

JEFFRIES ET AL. V. WILLIAMS.

(5 Exchequer, 792; 1 English Law & Equity, 433. Court of Exchequer, 1850.)

Injury to building by undermining—Essential averments. A declaration in case by reversioners stated that certain buildings and closes were in the occupation of A and B, as tenants of the plaintiffs, the reversion belonging to them. That the defendant so negligently and without leaving proper support worked certain mines near and contiguous to the premises, and dug minerals out of the mines near and contiguous to the said buildings and closes, whereby large portions of the buildings became injured and the ground on which the building stood and the said closes swagged and gave way: *Held*, that the declaration was good; that as it did not appear that the soil in which the mines were, belonged to the defendant, or that the defendant had all the right to get the mines that the owner of the adjoining soil had, the defendant was *prima facie*, a wrongdoer and that it was unnecessary to aver that the plaintiffs had a right to have the buildings supported by the soil under which the defendant worked.

Distinction between "near" and "contiguous" lands, stated.

Special plea required. A right to get minerals so as to leave the soil or the buildings above it without support must be specially pleaded.

Case, by the plaintiffs as reversioners. The declaration stated that certain messuages, buildings and closes of land were in the occupation of J. F., J. M., and others, as tenants to the plaintiffs, the reversion thereof still belonging to the plaintiffs. That the defendant so wrongfully, carelessly, negligently and improperly, and without leaving any proper or sufficient support in that behalf, worked certain mines underground near and contiguous to (and under) the said premises, the reversion whereof then belonged to the plaintiffs, and dug the minerals out of the said mines near and contiguous to (and under) the said messuages, buildings, and closes of land whereby the foundations of the said messuages and buildings were then weakened and injured, and in consequence thereof large portions of the said messuages and buildings became prostrate, cracked, injured, and wholly uninhabitable, and the ground on which the said messuages and buildings stood, and the said closes, greatly swagged and gave way, and the said messuages and buildings and closes became utterly useless and of no use or benefit to the plaintiffs.

The defendant pleaded not guilty, and other pleas.

At the trial, before Lord CAMPBELL, C. J., at the last Warwickshire Spring Assizes, it appeared that previously to the accruing of the plaintiffs' title, the defendant, who was entitled to the mines under the plaintiffs' houses and land, had excavated the soil underneath the houses of the plaintiffs, but that no damage had been done thereby either to the houses in question or the surface land. The act of the defendant for which the present action was brought, consisted in his having made an excavation near to but not under the plaintiffs' land, which excavation, in consequence of the support of the plaintiffs' land having been previously weakened by the defendant, occasioned the houses to crack and the surrounding land to sink. The jury found that the defendant had not excavated under the land since the plaintiffs had become entitled to the reversion, but they found that the houses had been injured and the soil had sunk in consequence of the excavations having been made adjoining to the plaintiffs' land. A verdict was found for the plaintiffs, with leave to the defendant to move to enter a nonsuit or a verdict.

Whitehurst having, in the following term, obtained a rule *nisi* to enter a nonsuit or verdict for the defendant, or for a new trial, and also to arrest the judgment—

HUMFREY and MELLOR showed cause.

WHITEHURST and HAYES in support of the rule.

The judgment of the court was delivered by PARKE, B. (His Lordship stated the pleadings, and then proceeded.)

On the trial, before Lord Campbell, C. J., at Warwick, it was admitted that the last two pleas must be found for the plaintiffs; and the question between the parties arose on the plea of not guilty. It appeared that the six cottages which were in possession of the plaintiffs' tenants had been seriously injured by the defendant making mines under the cottages and near to them, but no mines had been worked under the cottages while the reversion belonged to the plaintiffs. They had ceased to be worked in the time of their father, the former proprietor; but whilst the plaintiffs had the reversion, the defend-

ant had worked one of the veins of coal ten yards, another lower one, one yard from the plaintiffs' soil, and this working the jury found to have been the cause of the damage. There was evidence that the mines were worked in a proper way, according to the practice of miners, and with reference to the interests of the coal owners, but that sufficient props were not placed, or ribs of coal left to support the surface. Indeed, there was no mode of working such veins of coal in such a soil so as to make the surface safe, and prevent it from what is termed "swagging." The jury found the plea of not guilty for the plaintiffs, but the chief justice reserved the question, whether, under the circumstances, the action could be maintained, and gave leave to move to enter a nonsuit. As to the charge of working the mines under the cottages, it is clear that must fail, as no such working was proved while the plaintiffs were entitled to the reversion. Whether the other plea, the third, ought not to have been partially found for the defendant, it is not worth while to inquire.

The residue of the charge is, that the defendant worked the mines near and contiguous to the cottages and closes of the plaintiffs. There do not appear to have been any closes except the site of the cottages, but there was no working "contiguous," that is, "so near as to touch" that site, but there was near to the site, and so near that the working in that place and the mining of the coal there caused damage to the cottages. The question, therefore, is, whether the residue of the declaration, that is, that part of the declaration, is good in law, and what should be the verdict on the plea of not guilty. The allegation is, that the defendant wrongfully, carelessly, negligently and improperly, without leaving any proper or sufficient support in that behalf, worked the mines and dug and got the minerals out of the mines near to the said messuages and closes, the reversion of which was the plaintiffs', whereby the foundations of the said messuages and buildings were greatly injured, and in consequence thereof large portions of the messuages and buildings fell down and were rendered uninhabitable, and the ground on which the buildings stood swagged and gave way, and they were rendered less valuable, and the plaintiffs injured in their reversionary interest.

We think this part is good. The objection to it is that

there is no allegation that the plaintiffs had any right to have the messuages supported by the soil under which the defendant got the mines; and if it had appeared in the declaration that the soil in which the mines were was the defendant's, or that the defendant had all the right to get the mines which the owner of the adjoining soil had, the objection would have been fatal; because, arguing against a person having the right to the adjoining soil, or claiming under one that had all the right to interfere with the soil, it would be necessary for the plaintiffs to show a title to the support of the soil, according to the doctrine laid down in *Wyatt* v. *Harrison*, 3 B. & Ad. 871. But if the defendant is not stated in the declaration to have any such right, and is therefore *prima facie* a wrongdoer, the declaration, it seems to us, would be sufficient. If a house is *de facto* supported by the soil of a neighbor, this appears to us to be sufficient title against any one but that neighbor, or one claiming under him. Just as one who should prop his house up by a shore resting on his neighbor's ground would have a right of action against a stranger, who, by removing it, causes the house to fall, but none against his neighbor, or one authorized by the neighbor to do so, if he took it away and caused the same damage; and this explains why there was no allegation of the right to the support of the adjoining soil in the case of *Smith* v. *Martin*, 2 Saund. 394; whereas, when the defendant appeared to be the owner of the adjoining soil the declaration was held bad for want of the allegation of a right, as in *Wyatt* v. *Harrison*, and *Peyton* v. *The Mayor of London*, 9 B. & C. 725. Now, in this case the defendant must be taken to be a wrongdoer, for he is not stated in the declaration to be the occupier or owner of the adjoining land, or to have under him all the rights that he has to mine and dig there; nor can either of these facts be collected by inference from the averments in it; at the most it may be conjectured that the plaintiffs do not mean to dispute that he had some right of mining; though even that is not to be necessarily inferred, as the plaintiffs only allege that the defendant carelessly, (that is, with respect to the plaintiffs' dwelling-houses,) and without leaving a sufficient and proper support for them and their land, got the minerals and caused the houses to fall, without admitting or denying that he had any right to do what he did.

The declaration being good in this respect, the only question on not guilty was, whether it was proved; and as the defendant did work the mines without taking due care not to do damage to the plaintiffs' houses, and without leaving a sufficient or proper support for them, the plaintiffs are entitled to a verdict. It is not a question whether he conducted himself properly with respect to the owner of the surface if he claims the mines under him, or if he himself was the owner of the surface and the mines, whether he acted carelessly or improperly with regard to his own interests. If he had the soil of the adjoining land himself, and in consequence a right to dig to the extremity of it, so that he left all the support which the plaintiffs' soil was entitled to in its natural state, without being weighted by the plaintiffs' houses, or if he had a right to get the mines derived from the owner of the adjoining land, with all his rights of excavating and getting the minerals, or if he had a right of getting the minerals, which he had derived under the owner of both the plaintiffs' land and the land adjoining, without leaving a sufficient support to the surface, with or without houses on it, he should have confessed the allegations in the declaration, including the insufficiency of the support, and excused them. Whether the defendant really had any justification for so getting the minerals as to leave no sufficient support to the plaintiffs' land and buildings, does not appear upon my Lord Chief Justice's note. Upon these pleadings the plaintiffs were clearly entitled to recover. We think, therefore, that the rule must be absolute to enter the verdict for the defendant on the plea of not guilty, so far as relates to working the mines and getting the minerals *under* the plaintiffs' buildings and land, and that the residue of the rule must be discharged.

Rule accordingly.

NICKLIN ET AL. v. WILLIAMS.

(10 Ex. 259. Court of Exchequer, 1854.)

[1] **Further damages from original act, after one satisfaction.** The withdrawal (by mining coal under an adjoining close) of any part of the stratum to the support of which the owner of the adjacent soil or house thereon is entitled, is a cause of action as an injury to the right, although no immediate damage ensues; and no fresh cause of action accrues by the occurrence of subsequent damage; therefore, to an action for damage caused by such withdrawal, it is a good answer that a prior action has been brought for damage consequent upon the wrongful act, on an accord and satisfaction agreed to and performed between the parties.

The declaration stated, that, at the time of the committing of the grievances, etc., the plaintiffs were seized in fee of certain land, with certain houses, cottages, and other buildings erected, standing, and being thereon, which said land, houses, cottages, and other buildings were contiguous and near to certain other land, and the plaintiffs were entitled to the support of their said land, houses, cottages, and other buildings, by the said land, to which the same were so contiguous and near as aforesaid, and by the strata under the same, and also by the strata of minerals under their, the plaintiffs', said land, of which last mentioned strata they, the plaintiffs, were not seized, nor did the same belong to them. And the defendant wrongfully, carelessly, negligently, and improperly, and without leaving any proper or sufficient pillars or supports in that behalf, worked certain coal and other mines under the said land, houses, cottages, and other buildings of the plaintiffs, and under the said land so contiguous to the same as aforesaid, and dug for, got and moved the coals, minerals, earth and soil of and in the said mines; and by reason thereof the soil and surface of the land of the plaintiffs sank in, cracked, swagged, and gave way; and by reason thereof also the said houses, cottages, and other buildings gave way, cracked, sank, and were displaced and distorted, and became ruinous, fallen down, and destroyed, and the plaintiffs have been deprived, and are likely to be further deprived, of the beneficial use thereof.

[1] Explained, *Backhouse* v. *Bonomi*, 13 M. R. 684.

Plea: That, after the committing of the alleged grievances and before this suit, it was agreed between the plaintiffs of the one part, and the defendant and one B. Wright, since deceased, of the other part, in manner following, that is to say: After reciting that an action at law had been commenced against B. Wright and the defendant to recover compensation for the injury done to certain property, consisting of six houses, land, etc. (being the land, houses, cottages, and other buildings of the plaintiffs in the declaration mentioned), by the working of the mines under or adjoining the same by B. Wright and the defendant (the damages, injury and claim in the declaration mentioned being the same damages and injury as in the said agreement mentioned, and no other or different), it was thereby agreed that all further proceedings in the said action should be stayed upon the following terms: namely, that B. Wright and the defendant, within five months from the date thereof, should make good all damage done or occasioned to the said premises as aforesaid, and restore and put the same in substantial and thorough repair to the satisfaction of S. Powell, of, etc., surveyor, and with such good and sufficient materials, and in such manner in all respects as he should require; and in case of default, B. Wright and the defendant should, at the expiration of the said period of five months, be liable to pay to the plaintiffs such a sum of money as S. Powell should thereupon certify to be equivalent to compensate the plaintiffs for the breach of the above agreement, and that the same should be recoverable as liquidated damages. B. Wright and the defendant were further to pay and make up all loss of rent which then already, or which during the said period of five months, or until the said premises should be restored as aforesaid, should be occasioned in respect of the said premises by reason of the injury to the same as aforesaid, the amount thereby to be also settled and certified by S. Powell, and to be in like manner recoverable as liquidated damages. (It was then further provided that B. Wright and the defendants should pay the costs of the action and of the surveyor.)

Averments: That the defendant and B. Wright did accordingly, in pursuance of the said agreement, within the space of five months and before this suit, make good all

damages done or occasioned to the said premises as aforesaid, and restore and put the same in substantial and thorough repair to the satisfaction of S. Powell, and with such good and sufficient materials and in such manner in all respects as he required, and that the defendant and B. Wright did, in pursuance of the said agreement and before this suit, pay and make up all the loss of rent then, or which during the said period of five months, and until the said premises were restored as aforesaid, was occasioned by reason of the injury to the same as aforesaid, according to the settlement and certificate of S. Powell. (The plea then proceeded to state that the defendant and B. Wright paid the costs.) That the performance of the said agreement was made by the defendant and B. Wright, and accepted and taken, before this suit by the plaintiffs, in full satisfaction and discharge of the claim in the declaration above mentioned.

New assignment: That the plaintiffs sue not for the damages, injury, or claim, in satisfaction and discharge of which the agreement in the plea mentioned was entered into and performed, but for that, after the repairing in the plea mentioned, and before the commencement of this action, by reason of the same acts of the defendant which caused the damage in respect of which the agreement was entered into, being part of the acts in the declaration mentioned, the land on which the said houses, cottages, and other buildings in the declaration mentioned were erected, standing and being, further sank in, cracked, swagged, and gave way, by reason whereof the said houses, cottages, and other buildings so repaired as in the plea mentioned, and other houses, cottages, and buildings of the plaintiffs, erected, standing and being on, the same land, gave way, cracked, sank, and were displaced and distorted, and became ruinous, fallen down, and destroyed.

Demurrer and joinder therein.

PHIPSON argued in support of the demurrer.

GRAY, *contra*.

The judgment of the court was delivered by PARKE, B. (after stating the pleadings).

It was not disputed that the agreement mentioned in the plea and its performance were an answer to the then existing cause of action, and the only question is, what was, in this case, that cause of action? Was it the actual damage to the plaintiffs' land and house, etc., or the injury to the plaintiffs' right to have their land and house, etc., supported by the land near it and the strata of coal, etc., under and near it, so that when any part of the stratum which was necessary to the support of the land and house was withdrawn, there was a cause of action, though no actual damage was done? For every injury to a right imports a damage; as laid down in the case of *Ashby* v. *White*, by Lord Holt, 2 Ld. Raym. 938, and adopted and recognized in several other cases referred to in *Webb* v. *Portland Manufactory*, 3 Sumner, 197, and *Embrey* v. *Owen*, 6 Exch. 353.

We think this action is for an injury to a right; and, consequently, there was a complete cause of action when the wrong was done, and not a new cause of action when damage was sustained by reason of the original wrong. When so much of the land, coal or substratum was taken away as to deprive the plaintiffs' land and house, etc., of the support to which the plaintiffs were entitled, a cause of action accrued, though no actual damage occurred by the sinking of the land or falling of the house, or any part of it, or even by part of the structure being cracked or displaced; although it would not be easy to prove that an essential part of the support was withdrawn, unless some actual effect upon the land or structure was produced. For this wrong the plaintiffs would have a right to recover a full compensation, including the probable damage to the fabric; and if they had already obtained a verdict with damages, they must be presumed to be satisfied for all the consequences of the wrong; and if, instead of having the verdict, they receive with their own consent a satisfaction, such satisfaction is to be considered to compensate for all the consequences of the wrong.

It remains to consider some cases cited and much relied upon on the argument before us, showing that the limitation of actions under particular statutes, directed to be brought within a certain time "from the fact committed," dated from the period when the consequential damage was occasioned; and,

therefore, it was said that the damage was the cause of action. Those statutes mean, no doubt, the limitation to run from the act, that is, the cause of action. But, on examining those cases, they do not appear to be for injuries to rights, which this is, but solely for consequential damages where the original act itself was no wrong, and only became so by reason of those damages, and therefore they do not apply. Thus, the case of *Roberts* v. *Read*, 16 East, 215, the first quoted, seems not to have been an action for depriving the plaintiff's wall of the support of the adjoining land in the street, to which it was claimed to be entitled, but for altering the natural or existing level of the street, in consequence of which the foundation of the wall was exposed to the rain and flowing of the waters and frost, and the wall fell. In such a case there was no right of action until the wall itself was injured. The same observation applies to the case of *Gillon* v. *Boddington*, 1 Ry. & M. 161. It seems clear that the damage was by the tide flowing in and damaging the wall, and washing away the materials. The report says the wall was undermined by the company deepening the dock; but the context, we think, explains that the word is not to be understood to mean that it was deprived of the support to which the plaintiff had a right; but the cause of action was the making of an excavation, the consequence of which was, that the water of the river washed away the soil from under the wall. The case of *Sutton* v. *Clarke*, 6 Taunt. 29; 1 Marsh. 429, also was a case of a consequential damage, not of injury to a right.

We think that the defendant is entitled to our judgment.

Judgment for the defendant.

SMART ET AL. V. MORTON.

(5 Ellis & Bl. 30; 30 Eng. Law and Equity, 385. Queen's Bench, 1855.)

Relative rights of the several owners of surface and minerals. When the surface and the minerals belong to separate owners, the owner of the surface is *prima facie* entitled to the support of the subjacent strata, and the owner of the minerals is bound so to work the mines as to leave sufficient support for the surface; but these rights may be varied by express stipulation.

[1] **Construction as to surface support—Coal mining.** Where the deed which granted the surface, reserving the minerals, contained only the provision that the grantor should have the collieries and coal mines, veins and seams of coal, together with free and full power and liberty at all times to work, sink, dig for, or win the same, and to drive drift or drifts, make watercourses, or do any other act necessary, needful or convenient for the working, winning, obtaining or getting the same, paying to the grantee treble damages for loss or damage sustained by reason of the working of the mines: *Held*, 1, that the terms of this reservation did not authorize the grantor to work the mines in such manner as to leave the surface without support; 2, that the entire removal of all the coal, so as to deprive the surface of support, was not an act necessary for the working and winning of the mines; 3, that upon the evidence, it was contrary to the approved practice of mining in the county of Durham at the date of the reservation to leave the surface without support.

Plea of custom, to what date referable. A plea that the defendants had done the acts complained of in accordance with the approved practice of mining, must be taken to refer to the practice at the date of the reservation, under which their alleged right accrued.

This was an action to recover damages for improper mining. The first count of the declaration alleged that certain messuages and buildings situate, etc., were in the occupation of one B. G. as tenant thereof to the plaintiffs, the reversion thereof then and still belonging to the plaintiffs. And that the plaintiffs were entitled to have the said messuages and buildings supported by the mines underground, contiguous and near to and under the said messuages and buildings; yet the defendant, well knowing the premises, wrongfully, carelessly, negligently and improperly, and without leaving any proper or sufficient support in that behalf, worked certain coal mines underground, contiguous and near to and under the messuages and buildings,

[1] *Burgner* v. *Humphrey*, 41 Oh. St. 340.

and dug for and got and took away coals, earth, and soil out of the said mines, whereby and by reason of the premises the foundations of the said messuages and buildings were greatly weakened and injured, and the walls of the said messuages and buildings became and were cracked and injured, and the ground on which the said messuages and buildings stood, subsided, cracked, swagged, and gave way.

The second count was to the same effect.

Plea: That long before the committing of the said acts complained of, and before the plaintiffs or either of them had any estate or interest in or title to the said buildings, messuages, and closes of land, or any or either of them, or any part thereof, to wit, on the 29th day of December, 1671, one Sir Ralph Cole, Bart., since deceased, was seized in his demesne as of fee of and in the land on which the said buildings and messuages were erected, standing and being, and of and in the said closes of land, and of and in other the lands and premises in and by the deed next thereinafter mentioned, granted, bargained, sold, aliened, enfeoffed, and confirmed to him, and also of and in the said mines, and other the mines, veins, and seams of coal in the said deed excepted and reserved; and being so seized, an indenture dated the said 29th of December, 1671, was made between the said Sir Ralph Cole, Bart., of the one part, and one Ralph Carr, Esq., of the other part, and which said indenture was and is to the tenor and effect, and in the words and figures following.

The deed which was set out in the plea conveyed the surface to Ralph Carr, but excepted and reserved the coal mines thus:

"The mines, veins, and seams of coal, lying and being within the said West Grange, otherwise Hither Grange, lands, tenements, closes, hereditaments, or any part of the said hereby granted or intended to be granted premises, or any part thereof, with free leave and liberty to sink, work, and win the same in any part of the said premises, and to drive drift or drifts, make water-gate or water-gates, or use any other way or ways for the better and more commodious working and winning the same in the said hereby granted or intended to be granted premises, or any part thereof, unto the said Sir Ralph Cole, his heirs and assigns, always excepted and reserved out

of this present grant; the said Sir Ralph Cole, his heirs and assigns, nevertheless, or such of them as shall dig, sink, or work coals, or for coals in the said premises, or any part thereof, always satisfying and paying unto the said Ralph Carr, his heirs and assigns, treble damages for such loss or damage as he or they shall sustain, or such other damage as is hereafter expressed for such his or their digging or working the same, and for way-leave through the said premises or any part thereof according to the covenant hereafter in these presents in that behalf mentioned and provided for recompense therein."

The covenant was as follows: "And lastly, whereas by the exception above in these presents mentioned, the said Sir Ralph Cole and his heirs and assigns are, notwithstanding these presents, to have the collieries and coal mines, veins, and seams of coal within the said premises, with free and full power and liberty, at any time and times hereafter, to work, sink, dig for or win the same; and to drive drift or drifts, make water-gate or water-gates, or to do any other act or thing necessary, needful, or convenient for the working, winning, obtaining or getting the same, with free liberty of way-leave over the said premises or any part thereof, for leading and carrying the same with carts or carriages to places convenient for laying or vending the same; therefore, the said Sir Ralph Cole, doth by these presents, for himself, his heirs, executors, administrators and assigns, and every of them, covenant, promise, grant, and agree, to and with the said Ralph Carr, his heirs and assigns, and every of them, in manner and form following, that is to say: that he, the said Sir Ralph Cole, his heirs or assigns, or such of them as shall at any time or times hereafter sink, dig for, work, win, or get any coals in any part of the said premises, shall from time to time upon request therein to him, them, or any of them, made by the said Ralph Carr, his heirs or assigns or any of them, well and truly satisfy and pay or cause to be well and truly satisfied and paid unto the said Ralph Carr, his heirs or assigns, or such of them as shall be the owner or owners of the said premises, or such part thereof in which such coals shall be so digged for, won, or wrought, all such sum and sums of money as shall amount unto treble the damages, loss, or prejudice which the said Ralph Carr, his heirs or assigns or any of them shall sustain

by reason of such digging, working, sinking, breaking of ground, and way-leave, or other matter or thing used or exercised in working or leading of coals there, such sum or sums of money for treble damages to be arbitrated, awarded, adjudged, and set down by four indifferent persons, two on either side, to be chosen within one month after such damage done, and so within one month after another from time to time as any new damage shall be done."

The plea after averring the identity of the lands and minerals mentioned in the deed with those mentioned in the declaration alleged that the plaintiffs were not entitled to have the said messuages and buildings supported by the said mine, save and except as aforesaid, or otherwise than subject to the said liberties and other rights, privileges, exceptions, reservations, and matters excepted and reserved out of the said grant by the said deed.

The plea then deduced the title of defendant to the mines from Sir Ralph Cole; and averred that he entered upon the said mines, and worked, sunk, dug for, and won the same in divers parts, etc., and did other acts, etc., necessary, needful, and convenient for the working, winning, obtaining, and getting the same; and in so doing the defendant caused the said damages in the declaration mentioned, the defendant doing no unnecessary damage on the occasion aforesaid, and the defendant's said acts being necessary for the working, sinking, digging, and winning the said mines; and the defendant did the said acts carefully, diligently, skillfully, and properly, and according to the course and practice of mining used and approved of in the county where the said mines are situated, and not wrongfully, carelessly, negligently or improperly, as in the declaration alleged; the said Sir G. M. (defendant's lessor) or the defendant being ready and willing to satisfy and pay to the plaintiffs damages according to the covenant in the said deed.

To that plea the plaintiffs demurred.

They also replied: First, by taking issue upon so much of the plea as alleged that the acts complained of were necessary for working, sinking, digging, and winning the said mines.

Secondly, by taking issue upon so much of the plea as alleged that the defendant did the acts complained of care-

fully, skillfully or properly, or according to the course and practice of mining, etc.

New assignment, of acts and grievances done in excess of the alleged rights, and upon other and different occasions, and for other and different purposes, and in other and different ways than those mentioned in the plea, and to a much greater extent than in the plea mentioned.

Plea to new assignment, not guilty.

At the last Durham Assizes, before CRESWELL, J., a verdict was found for the plaintiffs, leave being reserved to the defendants to move to enter the verdict for them.

A rule was accordingly obtained during the present term to enter the verdict for the defendant upon all the issues of fact.

It appeared at the trial that the practice formerly was so to work out the coal as to leave pillars for the support of the superincumbent soil; but that since 1810 the practice has been to work out all the coal, paying compensation for subsidence; the practice of working out under buildings, however, being disputed. The defendant has worked out all the coal under both land and buildings (and if he was entitled to do so without leaving support,) in a skillful and proper method.

April 26th, WATSON was heard in support of the demurrer.

BRAMWELL, *contra.*

WATSON and MANISTY, at the same time, showed cause against the rule for entering the verdict for the defendant; and KNOWLES and UNTHANK were heard in support of it.

The argument turned chiefly upon the construction of the deed; but the following authorities were referred to: *Harris* v. *Ryding*, 5 M. & W. 60; *Jeffries* v. *Williams*, 5 Exch. 792; *Humphries* v. *Brogden*, 12 Q. B. 739; Com. Dig. *Fait*, E, 8; *Durham Railway* v. *Walker*, 2 Q. B. 940.

Cur. adv. vult.

LORD CAMPBELL, C. J.

We are of opinion that upon the demurrer to the plea the plaintiffs are entitled to judgment. The rights and obligations of parties where the surface of land belongs to one owner and the minerals under it belong to another, ap-

pear to be well settled by the two cases of *Harris* v. *Ryding*, and *Humphries* v. *Brogden*. *Prima facie* the owner of the surface is entitled to support from the subjacent strata, and if the owner of the minerals works them, it is his duty to leave sufficient support for the surface in its natural state. But the *prima facie* rights and obligations of the owner of the surface and of the minerals may be varied by the production of title deeds or by other evidence. Upon the present record we are to assume that the rights and obligations of the plaintiffs and of the defendant which would exist as of common right, are only varied by the deed of 29th December, 1671, severing the surface from the minerals and making of them two separate tenements to be thereafter held under separate titles. The declaration claiming the right to support for the surface from the minerals, alleges that the defendant improperly worked the minerals "without leaving any proper or sufficient support in that behalf," whereby the surface and the houses upon it "subsided, cracked, swagged, and gave way." The plea confessing that the defendant did work the minerals without leaving such support, and that thereby the alleged consequence took place, justifies under the reservation and the powers to be found in the deed. On the execution of the deed, the surface passing to Ralph Carr, the minerals remained in Sir Ralph Cole; but the simple reservation of the minerals would not deprive the grantee of the surface of the right to support from the minerals, and the defendant must rely upon the special powers reserved as to the working of the minerals. Upon the severance of the surface and the minerals a deed might be framed, empowering the owner of the minerals to remove the whole of them without leaving a support for the surface, compensation being made to the owner of the surface for the damage thereby occasioned to his tenement. But we consider *Harris* v. *Ryding* an express authority to show that the deed of 1671 is not so framed. We have compared it with the deed in *Harris* v. *Ryding*, as set out in the report of the case, and with a full copy of that deed, which has been furnished to us; and for this purpose, we can discover no substantial difference between them. It may be contended that the powers here reserved of working and winning the coals, are not confined to such as are to be exercised on the surface; but, wherever exer-

cised, they are perfectly consistent with the exercise of them, being subject to the implied right of the owner of the surface to support from the minerals. If the owner of a house were to convey it to another by deed, reserving the lower story to himself, whatever powers he reserved for the enjoyment of this story, unless the right of support is renounced by the grantee of the superior stories, these powers must be considered as only meant to be exercised subject to this right being respected. Compensation was stipulated in *Harris* v. *Ryding*, for any damage done under the license, and the mere amount of compensation can not vary the construction of the license. The right to compensation may well be contemplated as extending only to injuries which may arise from mining, the mining being carried on in such a manner as that the surface is still left to enjoy a sufficient support. Without further comment we give judgment on the demurrer for the plaintiffs, and we are glad to be informed that the case is immediately to be removed into a court of error [1] where all the authorities upon the subject may be reviewed. We are likewise of opinion that the verdict entered for the plaintiffs on the first and second replications ought to stand. We think that the acts complained of which caused the subsidence of the surface were not "necessary for the working, sinking, digging, and winning the said mines," although necessary for the complete removal of all the minerals reserved. We likewise think that upon the admission, and the evidence given at the trial, the acts complained of were not done "carefully, skillfully, or properly, or according to the course and practice of mining" as alleged. We can not say that the evidence is sufficient to prove a course and practice, where the surface with houses upon it belongs to one owner, and the strata of coal to another, for the owner of the coal to remove the whole of the coal so as to make the surface swag and the houses to tumble down. Besides, we think, in accordance with the opinion of Parke, B., in *Harris* v. *Ryding*, 5 M. & W. 60, that the course and practice alleged must be taken to be the course and practice used and approved of in the county of Durham at the time of the reservation. But, according to the course and practice of mining in this county till 1810, ribs of coal were left to support the surface. The same observations apply to

[1] We do not find it carried further.

the issue on the new assignment, the finding as to which was properly admitted by Mr. Knowles in his argument to depend on the construction to be put on the deed. The new assignment is in respect of acts done in excess of the alleged rights, and on other and different occasions, and for other and different purposes, and in other and different ways than those mentioned in the plea: that is, in effect, for acts done without such necessity as mentioned in the plea, and not according to the course of good mining. As we held that the acts were not necessary for the purposes allowed by the deed, nor according to the course of good mining referred to in the deed, the finding on the issue on the new assignment will also be entered for the plaintiffs.

Judgment for the plaintiffs on the demurrer, and rule discharged.

DUGDALE v. ROBERTSON.

(3 Kay & Johnson, 695. High Court of Chancery, 1857.)

[1] **Right implied in lease.** There is a *prima facie* inference at common law upon every demise of minerals or other subjacent strata, where the surface is retained by the lessor, that the lessor is demising them in such a manner as is consistent with the retention by himself of his own right to support. In the absence of express words showing clearly that he has waived or qualified his right, the presumption is, that what he retains is to be enjoyed by him *modo et forma*, and with the natural support which it possessed before the demise.

[2] **Entry allowed to build support.** Surface owners, by provision in decree, allowed to enter mines for the purpose of making supports to maintain buildings.

By an indenture of demise, dated 1842, and made between the then owners in fee of the demised property, whose interest was now vested in the plaintiffs, of the one part, and the defendants of the other part, the parties of the first part granted and demised to the defendants (*inter alia*) all and every the mines, veins, pits, beds, and seams of iron, ironstone, coals, metals, minerals, and the ores thereof, and also all other min-

[1] *Hodgson* v. *Moulson*, 8 M. R. 511.
[2] *Thomas Co.* v. *Allentown Co.*, 8 M. R. 36.

erals, metals, and earths whatsoever, which then were or thereafter during the continuance of that demise might be found out, opened, or discovered, by any ways or means whatsoever, in, upon, or underneath 514 acres of land delineated in the plan thereto attached; and also full and free liberty, license, and authority for the defendants and their agents, miners, workmen, colliers, servants, laborers, and others to dig, open, search for, work, gain, raise and get up, stack and carry along, use, sell, and dispose of all sorts of iron, ironstone, coal, or the ores thereof respectively, and also all other metals, minerals, and earths, in, from, over, upon, or under the said farms, lands, and premises, and every or any part thereof; and to open, dig, sink, drive, win, work, and make any pits, shafts, levels, cuts, canals, soughs, tunnels, trenches, drains, watercourses, weirs, railroads, tramroads, wheelroads, deposits of rubbish and spoil-banks, into, upon, about, or under the said mines and works, lands and hereditaments, except in or upon any demesne lands and pleasure grounds belonging to and occupied with the mansion called Brymbo Hall, and colored red upon the said plan. Provided that all pits or works sunk or raised for the purpose of working the minerals under the grounds colored yellow in the plan, should be sunk and raised at the furthest point from the mansion house, at the part colored yellow; to hold the premises to the defendants for a term of sixty years, at the yearly rents and royalties therein mentioned. And the indenture contained covenants by the defendants not to do any act whereby the said lands and grounds should be unnecessarily injured; and not to commit any manner of waste, damage, or injury other than such as should be reasonably necessary or unavoidable, in or upon any of the said lands thereinbefore described, under or by virtue of the powers thereinbefore contained. The indenture also contained a covenant by the defendants at all times during the continuance of the said term, to allow to the parties of the first part, their heirs or assigns, "or other the occupier or occupiers for the time being of Brymbo Hall aforesaid," such coal as they should reasonably require, at certain specified rates of payment.

The demesne lands and pleasure grounds attached to the mansion house, and colored red in the plan, comprised about four acres. The lands colored yellow in the plan consisted of ornamental grounds surrounding the lands colored red.

By virtue of this demise the defendants assumed a right to excavate under the lands colored red as well as under those colored yellow, and proceeded with such excavation until the mansion and offices began to give way.

The plaintiffs thereupon filed their bill for an injunction to restrain the defendants from excavating under the lands colored red, or under any portion of the lands colored yellow, supporting or assisting in the support of the lands colored red; and for an order upon the defendants to fill up all the excavations already made by them under the lands colored red.

The cause now came on to be heard upon motion for a decree.

Mr. ROLT, Q. C., Mr. JAMES, Q. C., and Mr. LITTLE, for the plaintiffs, contended, first, that the mines and minerals under the lands colored did not pass by the lease; secondly, that, if they did pass by the lease, they were not authorized to be excavated or gotten; and thirdly, that, in any event, the defendants were not entitled to excavate or to work any mines or minerals under any lands mentioned in the lease, so as to injure any part of the mansion and offices.

The law was clear, that, of common right, and independently of any evidence to show how the surface and the minerals have come into different hands, the owner of the surface is entitled to support from the subjacent strata, and if the owner of the minerals remove them, it is his duty to leave sufficient support for the surface in its natural state: *Humphries* v. *Brogden*, 12 Q. B. 739; and this common law right is not affected by the special contract, but the plaintiffs are entitled to the benefit of both: *Caledonian Railway Company* v. *Sprot*, 2 Macq. 449, where land had been granted to a railway company, reserving the minerals to the grantor, and it was held that the latter was not entitled to work even under his own adjoining lands in any manner calculated to endanger the railway. See also the *Caledonian Railway Company* v. *Lord Belhaven*, 3 Jur. N. S. 573, where the same rule was followed.

The vice-chancellor held, upon the first point, that the mines and minerals under the land colored red were included in and passed by the lease.

Mr. WILLCOCK, Q. C., Mr. CAIRNS, Q. C., Mr. KENYON and Mr.

EDDIS, for the defendants, contended that if the first point was decided in their favor, the second must be so. If the mines and minerals under the land colored red were included in and passed by the lease, it could not reasonably be contended that the defendants were not authorized to excavate and get them. Another construction must be put upon the words "except in or upon any demesne lands, etc., colored red," which, in fact, were intended merely to prevent the opening of pits, and the digging and sinking of shafts and levels in or upon any such demesne lands, and not to prevent excavating below them.

Then, as to the right to support from the subjacent strata, it was clear that whatever may be the common law rights, in the absence of special contract, it is open to parties, by special contract, to qualify and even to waive their *prima facie* right to support, and to deprive themselves of their right to damages or to protection in respect of injury, however great, occasioned by the working of the minerals below the surface: *Rowbotham* v. *Wilson*, 25 Law J. (Q. B.) 362.

The present case was distinguishable from *Harris* v. *Ryding* 5 M. & W. 60, as well as from *Smart* v. *Morton*, 5 Ell. & Bl. 30. Here the mines were granted; the surface was reserved. There, conversely, the surface was granted, and the mines were reserved. In those cases, therefore, it might well be held that the grantee of the surface had a *prima facie* right to support, from which nothing in the grant could authorize the defendant in so working his mines as in any way to derogate.

The vice-chancellor intimated to Mr. Rolt, that he was prepared, without hearing a reply, to make the decree set out below; but if he required more he must hear him.

Mr. ROLT, Q. C., would be satisfied with the decree proposed.

Vice-Chancellor Sir W. PAGE WOOD.

The question in this case resolves itself into the construction to be put upon the indenture; and upon the terms of the indenture it is clear that the mines and minerals under the lands colored red were included in and did pass by the lease; but that the defendants were not authorized by that indenture to

work them, or to execute any works upon those lands, or to search for any coal or mineral therein. (His Honor showed this from the words of the indenture and from the evidence as to the conduct of the parties, and proceeded—)

As to the rest of the lands comprised in the indenture, the common law right is now clear from the decision of the Court of Queen's Bench in *Smart* v. *Morton*, 5 Ell. & Bl. 30, although that did not carry the law further than the decision of the Court of Exchequer in *Harris* v. *Ryding*, 5 M. & W. 60. In *Smart* v. *Morton* there was a plea, that, in the deed by which the surface was granted to the parties through whom the plaintiff claimed, there was an express reservation of the mines, with liberty to work those mines and drive drifts and use any other ways for the better and more commodious working and winning the same; and the grantor covenanted to pay treble damages for such loss or damage as should be sustained by the grantee; that it was in the necessary and needful working of the mines that the defendant had caused the damages complained of, and that he was ready to pay damages according to the covenant. But, on demurrer, the court held, that the plea was bad; for the occupier of the surface had a *prima facie* right to the support of the subjacent strata, and the deed did not authorize any working in derogation of that right.

And so, conversely, where the minerals are demised and the surface is retained by the lessor, there arises a *prima facie* inference at common law upon every demise of minerals or other subjacent strata, that the lessor is demising them in such a manner as is consistent with the retention, by himself, of his own right to support, as in the case put in the judgment of the House of Lords (2 Macq. 449) of a demise of the upper part of a house. If I demise to you the lower story of a house, and reserve to myself an upper story, the presumption is that I do not part with my right to be supported by the story I demise.

It is true, there may be an express stipulation, as there was in *Rowbotham* v. *Wilson*, 25 Law J. (Q. B.) 362, by which the owner of the surface waives his right to support, and agrees to allow the mines to be so worked as to destroy his property; but in the absence of express words, showing distinctly that he has waived or qualified his right, the presumption is that what

he retains is to be enjoyed by him *modo et forma* as it was before, and with that natural support which it possessed before he parted with the subjacent strata; and so it would be in the case of a watercourse or other easement of a like nature.

If any evidence were required in aid of this presumption, no deed ever contained clearer indication than the present, that the property was intended to be occupied and enjoyed as before the lease; for here there is an express covenant on the part of the defendants to supply the plaintiffs "or other the occupier or occupiers for the time being of Brymbo Hall," the mansion in question, with coal. But no such evidence is required.

(*Minute of Decree.*)

Declare, that the defendants are not entitled, under the lease, to work any coal or mineral, or execute any works upon the portion of land marked red upon the plan attached to the lease, or to search for any coal or mineral therein; and order an injunction accordingly.

Declare that the plaintiffs are entitled to have a sufficient support for upholding the mansion house called Brymbo Hall, and the offices and buildings upon the said portion of land colored red; and that the defendants are not entitled to remove any of the earth or soil necessary for such support from any part of the demised premises.

Inquire whether any and what part of the lands comprised in the indenture of demise, other than the portion of land colored red, affords such support to the said mansion house, offices, and buildings, as to render it necessary that the same or any or what part thereof should be left undisturbed for the purpose of such support.

Liberty for plaintiffs to bring any such action as they may be advised in respect of any past working of the mines.

Defendants to permit plaintiffs at all reasonable times to have access to the mines for the purpose of making such supports as may be necessary for upholding the mansion.

[1]HAINES v. ROBERTS ET AL.

(7 El. & Bl., 625. Court of Exchequer Chamber, 1857.)

Mines must leave support to buildings. Where the ownership of the soil was invested in one and the ownership of the mines in another under an Inclosure Act prohibiting the working of the mines within forty perpendicular yards of the foundations of buildings, it was *held* that the prohibition to work within that distance was absolute, but that the miner was liable under common law rules for damage done by mining beyond that distance.

Action for injuring the plaintiff's reversion in certain messuages, which of right enjoyed the support of certain foundations, by improperly removing the minerals under them. Plea 2 (the only one material) was a traverse of the right to the support.

On the trial, the plaintiff had a verdict, subject to leave to move to enter a nonsuit.

The Court of Queen's Bench having granted a rule to enter a nonsuit, which was discharged, the defendant appealed. The case for the appeal set out a private act, the material part of which is stated in the report of the case below, and the facts in substance, as there stated.

Sir F. KELLY for the appellant, defendant below, argued to the same effect as in the court below.

ALEXANDER, for the respondents, plaintiffs below, was not called upon to argue.

COCKBURN, C. J.

We are all of opinion that the decision of the Queen's Bench was right. The question arises on the second issue, which traverses the right to support. Now, looking to the provisions of the private act, it appears that the effect is to place the parties in the same position as though the lord,

[1] *Roberts* v. *Haines*, 6 El. & Bl. 643, affirmed.

originally owner in fee of the whole soil, had conveyed the surface to the allottees. I concur with the Queen's Bench in thinking that, under such circumstances, the owners of the surface have a right to support, which is the main question in this case. Our attention had been called very properly to the clauses at pages 56 and 57 of the act. The clause at page 56 applies to the case of the lord entering on the surface and working there, which is not the case now before us. The clause at page 57 contains a prohibition against working the mines within the perpendicular distance of forty yards from the foundation of any houses. I am of opinion that this is an absolute prohibition against working within that distance, but that it does not confer a right to work beyond it whatever damage may be done thereby. It is necessary only to say that, though the jury have found there was no negligence in the working, it does not interfere with the plaintiff's right to recover. The complaint in the declaration is that the defendant worked negligently "and without leaving any proper or sufficient support." The finding of the jury does not negative this, but the contrary.

POLLOCK C. B. and CRESWELL, J., concurred.

MARTIN, B.—I will only add that I am inclined to think that the clause at page 56 applies to working the mines in any way; and that a good plea might probably be framed upon it. But on the pleadings the judgment is right.

CROWDER, J., WILLES, J., BRAMWELL, B., and CHANNELL, B., concurred.

Judgment affirmed.

BROWN v. ROBINS.

(4 H. & N. 186. Court of Exchequer, 1859.)

Old and new excavations. The plaintiff was the owner of a house erected in 1834, on solid ground. Previously to the building of the house a portion of the minerals had been gotten under a garden which adjoined the house. In 1838 a portion of the minerals was gotten under the defendant's land which adjoined the garden. In 1865 the defendant

commenced getting out the rest of the minerals under his land. In 1857 the plaintiff's land sank, and the house was injured by the defendant's mining operations. It was found by the jury that the sinking of the plaintiff's land was caused by the defendant's workings; that some damage would have happened, but not to the same extent, if the garden ground had been left solid; that the defendant knew of the excavations under the garden; that the land would have sunk in just the same whether there was a house on it or not; and, lastly, that the damage to the plaintiff's house by the sinking was £300; £250 occasioned solely by the defendant's workings and £50 damages caused in part by the excavation under the garden: *Held*, (1) That inasmuch as the sinking of the plaintiff's land was in no way caused by the weight of the house, the plaintiff was entitled to recover whether he had acquired a right to support for his foundations by the defendant's soil or not. (2) That although the excavation under the garden contributed to the extent of £50 to cause the damage, the plaintiff was entitled to the whole £300, because, if the defendant had not done the wrongful act complained of, no part of the damage would have occurred.

Custom of leaving pillars for the time being and of returning to remove them after the land has been allowed to slowly settle—in the statement of the case.

Declaration, that whereas before and at the time of the committing of the grievances, etc., the plaintiff was possessed of certain land with a certain house and outbuildings standing and being thereon, and whereas there were certain foundations of and supporting the said house and outbuildings, which the plaintiff had of right enjoyed and ought to enjoy, yet the defendant wrongfully, negligently, carelessly, and improperly, without leaving sufficient support in that behalf, worked certain mines near to and adjoining the said land, whereby the said land and the said foundations of the said house and outbuildings sank, swagged, and gave way, etc.

Pleas—First: Not guilty. Second: That at the time of the supposed grievance the plaintiff did not of right enjoy nor ought of right to enjoy, the said foundations of and supporting the said house and outbuildings.

At the trial, before BYLES, J., at the last Stafford Assizes, it appeared that the plaintiff was the owner of a house and outbuildings, situate to the east of a lane called Bill Hay Lane, but not adjoining to it, inasmuch as a garden and lawn, belonging to another owner, lay between the plaintiff's premises and Bill Hay Lane, and adjoined them on the opposite sides. The plaintiff's house had been built in 1834 on solid ground. Be-

tween 1828 and 1831 coal had been gotten by one Jesson from under that part of the garden and lawn which adjoined the lane, but not up to the plaintiff's premises. Ribs and pillars of coal were at that time left to support the surface. In 1838 Jesson began to work the coal on the west side of Bill Hay Lane, leaving a rib of coal against the lane. In 1846 "crownings in" took place in the lawn and garden. In working the thick coal in Staffordshire, it is the practice to get out a certain quantity of coal in the first instance, leaving what are called ribs to prevent water and air from coming in from adjoining mines and pillars to support the surface. The pillars are eight yards square, the intervals between them eight yards in width. When the coal is worked out between the pillars, the mines are left for some years that the earth may settle. During this time it sometimes happens that in some places droppings of earth continually take place from the roof between the pillars, and by degrees the surface falls in, causing a basin-shaped hollow on the surface; this is called "a crowning in." After the soil has become consolidated the mine is again worked, and the ribs got out as far as possible. In 1854 the defendant, who was then the owner of the mines on the west side of Bill Hay Lane, began to work out the ribs and pillars left by Jesson in 1838. The nearest of the defendant's workings were at a distance of thirty-five yards from the plaintiff's house. In 1857 the plaintiff's house began to crack. The plaintiff's witnesses alleged that the damage was caused by the getting of the ribs and pillars by the defendant on the west side of Bill Hay Lane. These was evidence that the defendant knew of the excavations on the east side of the lane.

The learned judge asked the jury: First, was the sinking of the plaintiff's premises caused by the defendant's workings, either alone or in conjunction with anything else? The jury answered this question in the affirmative.

Secondly: Would the same damage have arisen from the defendant's workings if the ground had been left solid on the east side of Bill Hay Lane? The jury found that it would not; but that some of the damage would have happened.

Thirdly: Did the plaintiff enjoy, as of right, support from the defendant's ribs and pillars? His lordship said that the

plaintiff's house was built in 1834. The excavations on the east side of Bill Hay Lane were finished in 1831, and therefore existed for twenty years when the defendant's workings began in 1854. If the defendant knew of the excavations on the east of Bill Hay Lane, the plaintiff had enjoyed as of right for twenty years the support of the defendant's soil. The jury found that the defendant did know of the excavations.

Fifthly: Did the land fall from the superincumbent weight of the house, or would it have fallen if no house had been erected upon it? The jury found that the land would have fallen in the same manner whether there had been a house upon it or not.

Sixthly: If the damages arose partly from the defendant's workings, and partly from the old workings to the east of Bill Hay Lane, how much was occasioned by the defendant's workings and how much by the old workings? The jury found £300 damages, £250 occasioned by the defendant's workings and £50 partly by the defendant's workings and partly by the old workings to the east of the lane. Upon these findings the learned judge directed a verdict to be entered for the plaintiff for £300, reserving leave for the defendant to move to enter a verdict or to reduce the damages to £250, neither party to be at liberty to bring error.

Huddleston, in Michaelmas term, obtained a rule to show cause why the verdict should not be entered for the defendant upon the plea of not guilty, so far as relates to the allegations that the defendant worked carelessly and negligently, on the ground that those allegations were not supported by the evidence; and on the second issue, on the ground that the plaintiff had not enjoyed, as of right, for twenty years, the right of support for his buildings from the ribs and pillars of coal worked by the defendant; that there was no evidence nor was it found by the jury that the defendant, or those under whom he claimed, knew for twenty years that the plaintiff's premises were in fact supported by the mines worked by the defendant; or why the damages should not be reduced to £250, on the ground that as to £50 the damage was not occasioned by the defendant's working, but by the "crownings in" on land adjoining the plaintiff's premises; or

why a new trial should not be had on the ground of misdirection, namely, that the learned judge should have directed the jury that no right of support from the ribs and pillars of coal west of Bill Hay Lane worked by the defendant was gained for the plaintiff's buildings, unless the defendant, or those under whom he claimed, knew for twenty years that in consequence of the excavated state of the mines east of Bill Hay Lane, the plaintiff's buildings were in fact being supported by the said ribs and pillars, and that there was no evidence of such knowledge, and that, as the plaintiff did not establish a right of support for his buildings from defendant's ribs and pillars, the damages were excessive in respect of any supposed injury to the plaintiff's land.

GRAY and SCOTLAND now showed cause.—The first objection is that there was no evidence that the defendant had worked the coal carelessly or negligently. But that is only material if the plaintiff was not entitled to the support of the defendant's soil. (Watson, B., referred to *Smart* v. *Morton*, 5 E. & B. 30, E. C. L. R. Vol. 85. Phipson abandoned the first point.) As to the second point. The plaintiff's house was completed in 1835. The damage complained of was done more than twenty years after the plaintiff's house had been erected upon its present foundations. (MARTIN, B.—In *Rowbotham* v. *Wilson*, 8 E. & B. 123, E. C. L. R. Vol. 92, Williams, J., points out that the right of support is a right of property, not an easement. POLLOCK, C. B.—Has a person any right to dig so near to the land of his neighbor as to disturb his soil, whether there is a house there or not?) Suppose a person builds a house at the extremity of his land, which has been excavated—after twenty years he gains a right of support for its foundations: *Partridge* v. *Scott*, 3 M. & W. 220. (MARTIN B.—It is difficult to understand how an easement can be gained by acquiescence under such circumstances.)

Thirdly, it is said that there was no evidence that the defendant knew of the extent of the excavations in the plaintiff's land. He knew that there were excavations, and his first duty in excavating his own land was, therefore, to leave a rib to prevent the plaintiff's land from being affected by his working. It was not necessary for the learned judge to leave to the

jury whether the defendant knew for twenty years that the plaintiff's house was enjoying the support of the defendant's land, because if the house had stood for twenty years he was bound to take notice of the fact. Fourthly, it is said that if there was no right of support for the house the damages were excessive. But the jury found that the weight of the house did not contribute to the accident. In Gale on Easements, p. 225, it is said: "It may be suggested that there are cases in which, though the house be modern, damages may be recovered for an injury done to it by digging too near the common boundary. If the owner establishes his right to support for his soil and the jury should be of opinion that the land would have fallen in, in consequence of the digging, even had no additional weight been imposed by building, the value of the house falling with the land might, it seems, be recovered, as damages resulting from the principal injury." In *Jeffries* v. *Williams*, 5 Exch. 792, Parke, B., pointed out that that is in accordance with 2 Roll. Ab., tit. "Trespass," (I), pl. 1. In *Jeffries* v. *Williams*, 5 Exch. 792, (Watson, B., referred to *The Earl of Lonsdale* v. *Littledale*, 2 H. Bl. 267,) the declaration was held good though it alleged no right of support for the house. In *Roberts* v. *Haines*, (at Nisi Prius, not reported on this point. See 6 E. & B. 643, E. C. L. R. Vol. 88; an action was brought to recover damages for injuries by mining to houses, some of which had stood for twenty years, some less. It was objected that the houses which had not stood twenty years had not acquired a right to support, and that therefore the plaintiff was not entitled to damages for the injury to them. Creswell, J., asked the jury whether the land would have fallen in if houses had not been built upon it; whether, in fact, they thought the weight of the houses had in any way caused the sinking of the ground. The jury found that the land would have sunk whether the houses were there or not. Upon which the learned judge told them that the plaintiff was entitled to damages to the extent of the injuries to all the houses. Here the plaintiff had a right to the support of the defendant's land. The defendant took away a portion of the minerals which gave the support. Being entitled to this support, and having been deprived of it, the plaintiff is just as much entitled to damages for the injury to his

house as he would have been to the value of a horse which might have been killed by the sinking of the soil. As to reducing the damages by £50, if the defendant had not worked his mines so as to deprive the plaintiff's land of support, no damage at all would have happened from the old workings.

PHIPSON and DOWDESWELL (with whom was HUDDLESTON,) in support of the rule.—Two questions were put by the learned judge which are material with reference to the second issue: First, suppose all was solid to the east of Bill Hay Lane, would the plaintiff's buildings have sustained damage? The jury said yes, but not to the same extent. Secondly, did the land fall in consequence of the superincumbent weight of the building, or would it have fallen just the same whether the building was there or not? The answers to these questions do not decided the second issue in favor of the plaintiff. In consequence of the excavations under the garden, the plaintiff's land required support by a greater portion of the defendant's land than it otherwise would have required. It may be admitted that a man can not dig a hole immediately adjoining his neighbor's land so as to let it in. Here, however, the excavation was at a distance, and the land was enjoying a sort of secret support. A person can not, by taking away the natural support of his own land, create rights against his neighbor. The defendant is entitled to have the second issue found for him. (MARTIN, B.—I think you have failed in raising it.) The plaintiff was bound to show that he was entitled to support by twenty years' enjoyment, because this is a case of support by adjacent land.

POLLOCK, C. B.—This rule must be discharged. As to the right of support for the house *qua* house, if necessary to decide it, which it is not, I should be disposed to hold that the plaintiff was entitled to the support of the surrounding ground. But the moment the jury found that the subsidence of the land was not caused by the weight of the superincumbent buildings, the existence of the house became unimportant in considering the question of the defendant's liability. It is as if a mere model stood there, the weight of which bore so

small a proportion to that of the soil as practically to add nothing to it. The plaintiff's complaint resolves itself into this, that the land was injured; and the house was considered by the learned judge solely with reference to the amount of the damages. Then it is said that the same amount of damage would not have happened if the land to the east of Bill Hay Lane had been left solid. If the excavation to the east of Bill Hay Lane contributed to the damage, did the defendant know that this ground was riddled by mines? The jury found that he knew it. He knew there was greater danger of injuring the plaintiff by sinking on the west side of the lane than there would have been if the ground on the east side had been left solid, and he ought to have known that the excavated ground was less powerful and gave less support on that side. He is therefore responsible for the whole of the damage. The objections upon which the rule was founded are answered in every part, and the rule must therefore be discharged.

MARTIN, B.—I am of the same opinion. The rule was obtained on several grounds. First, that there was no evidence of negligence on the part of the defendant. It was admitted that this fails because, if the plaintiff was entitled to the support of the defendant's land and was deprived of it, the absence of negligence is immaterial. Secondly, that the support was not enjoyed as of right. The mode in which the question was dealt with shows that this issue was properly decided in favor of the plaintiff. There was ample evidence that the defendant knew the state of the plaintiff's land. There is no ground for reducing the damages. The house was lawfully on the plaintiff's land and was damaged by the unlawful act of the defendant. As to the point that no right of support by the defendant's ribs and pillars had been acquired, unless the defendant knew that in consequence of the excavated state of the plaintiff's ground his buildings were in part supported by these ribs and pillars, and there was no evidence of such knowledge, I think there was ample evidence. I do not wish to consider that as a criterion of the defendant's liability; but it was so treated.

WATSON B.—When the report of the learned judge was read, it became clear that there was no ground for this rule. It was alleged that there was no evidence that the defendant

had worked carelessly; but the meaning is that he worked carelessly with reference to the rights of the plaintiff. The defendant desired to raise a question as to the right of support by adjacent land. When a great weight is put on land which immediately causes a pressure upon the adjoining land, a nice question sometimes arises; but here everything was determined by the finding of the jury that the accident was not caused by the weight of the building, and that this weight had no effect in causing the subsidence of the soil. As to the damages, the jury found that the defendant, knowing the state of the plaintiff's land, worked his own mines and so caused the injury. There is, therefore, no ground for reducing the damages.

CHANNEL, B.—The learned judge left certain questions to the jury. The findings, which are not impeached, taken in connection with the questions, appear to me to leave no room for the argument attempted to be raised on the part of the defendant.

Rule discharged.

BACKHOUSE v. BONOMI.

(9 H. L. C. 503. House of Lords, 1861.)

[1] **Statute of Limitations does not begin to run until injury occurs.** The right of a person to the support of the land immediately around his house is not in the nature of an easement, but is the ordinary right of enjoyment of property; and till that is interfered with, he has no legal ground of complaint, although, in fact, something may have been done which (without his knowledge), has occasioned results that will afterward affect his property.

Idem—Recent injury from old undermining. A was the owner of certain houses standing on land which was surrounded by the lands of B, C and D. E was the owner of mines running underneath the lands of all these persons. He worked the mines in such a manner (without actual negligence) that the lands of B, C and D sank in; and after more than six years' interval their sinking occasioned an injury to the houses of A. *Held*, that a right of action accrued to A when this injury actually occurred, and that his right was not barred by the Statute of Limitations.

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[1] *Williams* v. *Pomeroy Co.*, 6 M. R. 195; *Nicklin* v. *Williams*, 13 M. R. 650; *McBee* v. *Loftis*, 3 M. R. 222; *Ecc. Com'rs* v. *N. E. R'y*, 12 M. R. 609; *Clegg* v. *Dearden*, 5 M. R. 88.

This was an action commenced by a writ of summons, dated 20th May, 1856, and brought by Bonomi and his wife to recover damages for an injury occasioned to certain houses of theirs, in the occupation of tenants. The declaration alleged that the plaintiffs "were entitled to have the said messuages and buildings supported; to wit, by the mines, earth and soil underground, contiguous and near to and under the said messuages and buildings; yet the defendant, well knowing the premises, wrongfully, carelessly, negligently and improperly, and without leaving any proper or sufficient support in that behalf, worked certain coal mines underground, contiguous and near to, and under the said messuages and buildings, and dug for, and got, and took away coals, earth and soil out of the mines, and wrongfully and unjustly kept and continued the said messuages and buildings, and caused them to be and remain without any proper or reasonable or sufficient support for a long space of time, whereby the foundations of the said messuages, etc., became and were greatly weakened and injured; and the walls of the said messuages became and were cracked and injured; and the ground on which the said messuages, etc., stood, subsided, cracked, swayed and gave way. That by means of the premises plaintiffs have been and are injured in their reversionary estate and interest in the said messuages and buildings," etc.

The defendant, who was the owner of the mines situated underneath the houses, pleaded, 1st, not guilty; 2d, a denial of the occupancy; 3d, denial of plaintiffs' reversion; 4th, denial of the alleged right to support; and 5th, that the alleged causes of action did not accrue within six years before this suit. Issue was taken on each of these pleas.

When the cause came on for trial at Durham, it was referred to Mr. Hindmarch to find the facts, and state the cause of the damage, with dates. Mr. Hindmarch stated a special case in which it was, among other things, set forth that the defendant in 1849 "worked and removed the pillars of coal which he had previously left unworked under about two acres of Daniel Simpson's land, and thus formed what is called 'Simpson's goaf,' which is about two hundred and eighty yards from the plaintiff's property. The removal of the pillars of coal in Simpson's goaf was completed before the latter

end of the year 1849, since which time there has not been any working in Simpson's goaf. After 1849 the rest of that part of the mine began to fall, and during the year 1850 the roof and the strata of stone, earth, and other material, above that part of the mine, fell down and subsided to such an extent and in such a manner as to produce what is amongst miners called a 'thrust,' and ultimately also the injurious consequences resulting from a 'thrust.'" He then found that the "thrust" produced the usual effects on the surrounding lands, and that those effects gradually extended; that "as the thrust in its progress arrived at any land in which the coal had been worked, the earth and material above the pillars of coal were dislocated and disturbed to such an extent as to throw down or crush the pillars of coal which had been left to support the roof of the mine, and then the roof fell, and the superincumbent strata and also the soil, subsided gradually, but also irregularly." * * * "The plaintiffs' houses and buildings were not injured before 1854, but during the course of that year the thrust and its injurious effects began to operate upon the plaintiffs' land, the pillars of coal underneath were thrown down or crushed, and consequently the surface of the land, the foundation of the plaintiffs' houses and buildings, and the various strata of stone and other materials" were injured as described in the declaration. Since 1854 the plaintiffs' land has been further disturbed and further subsided, in consequence of the continued operation of the thrust above mentioned, and the plaintiffs' house and buildings had, in consequence, received further damage between that year and the commencement of this action, 2d May, 1856. Before this subsidence first commenced in December, 1854, the plaintiffs did not know, and had no reason to suspect, that the thrust which was the cause of such disturbance and subsidence was in operation or existence, nor had they any knowledge of the way in which the defendant had worked the mines under Simpson's land so as to create Simpson's goaf, and to produce the thrust above mentioned. This thrust was the sole cause of the damage to the plaintiff's houses. Since the commencement of the action further subsidence had taken place and the value of the house and buildings was much diminished. The defendant did not take any steps to arrest the progress of the thrust or

to prevent it from extending. If the coal mines under the lands surrounding the plaintiffs' house had been left unworked to a sufficient distance from the houses, they would not have sustained damage. The defendant might also have supported the roof in such a manner as to prevent it; but the expense of doing so would have been larger than the value of the property injured.

On this finding, judgment was given in the Court of Queen's Bench (Mr. Justice Wightman dissentiente) for the defendant, on the ground that the cause of action had occurred more than six years before action brought. (Ellis, B. & E. 622.) The case was taken, on error, to the Exchequer Chamber, where the judgment was reversed. (Ellis, B. & E. 646.) The present proceeding in error was then brought.

The judges were summoned, and Lord Chief Baron Pollock, Mr. Justice Wightman, Mr. Justice Williams, Mr. Justice Blackburn, Mr. Justice Byles, and Mr. Baron Wilde attended.

SIR F. KELLY and Mr. PHIPSON, for the plaintiff in error.—The real cause of action here was the removal of the supports. When they were taken away the injury was complete, and the right of action arose.

(LORD CHELMSFORD.—The thrust was not immediately injurious to the land, but was ultimately the cause of the injury.

THE LORD CHANCELLOR.—But you say that the consequences of that thrust might have been foreseen as soon as the thrust occurred.)

That is so. In 1849 pillars were removed; the thrust followed; the foreseen and inevitable consequence was the mischief of which the plaintiffs below complained, therefore the *causa causans* was the removal of these pillars. On that the right of action was complete, and the action might have been brought (*Humphries* v. *Brogden*, 12 Q. B. 739). In *Nicklin* v. *Williams*, 10 Exch. 259, it was held, under circumstances exactly similar to the present, that the cause of action was the injury to the plaintiffs' right to have their land and houses supported by the contiguous land and strata of coals, and therefore when any part of the necessary support was removed, although there was no actual damage, there was a complete cause of action, for which the plaintiffs might have recovered

prospective damages; and no new cause of action arose from the subsequent damage. The principle is that the right of action is complete as soon as the wrongful act is done, and that was why, in that case, as Mr. Baron Parke observed (10 Exch. 267), "The agreement and its performance were an answer to the then existing cause of action." (LORD BROUGHAM.—Do you take *Nicklin* v. *Williams* to go further than this, that it is the damage, and not the cause of the damage, which gives the complete right of action? LORD CHELMSFORD.—Suppose a man in such a case as this to put up an artificial support, which is insufficient; at what time would the cause of action arise?) From the moment that the insufficient support is put up; and the owner of the house is not bound to wait till actual damage occurs, but may bring his action at once. The rule is stated in *Mellor* v. *Spateman*, (1 Wms. Saund. 346 b, n. (2), and applies directly to this case, notwithstanding the distinction set up by Mr. Justice Willes in the court below, (Ellis, B. & E. 657), that this was an act done by the defendant in his own soil. If A has a piece of land, and a house on it, and has the land of B to the north, and the land of C to the south, with the common law right to support from both, and B in 1850 excavates his land, and removes the support which his land had afforded, A has a right of action immediately, though he does not suffer any injury until C, in 1860, has also excavated, when A's land sinks, and his house falls on B's side. A can not then bring an action against B, for he was bound to bring it before. If he has the option of bringing an action or not, the statute runs from the moment that the option arises. In that respect there can be no difference between the case of a pillar of coal supporting the earth and a pillar of brick supporting the earth. There could be no doubt about the latter. (LORD CHELMSFORD.—So long as the support is rendered, no matter how it is rendered, there is no cause of action.)

It is clear that if a man brings an action for an injury to his wall, and gets forty shillings damages, but afterward, from the same cause, an injury of a larger extent occurs, he can not bring a new action in respect of this larger injury.

(THE LORD CHANCELLOR.—The certificate finds that what did actually uphold the houses were pillars in the adjoining

ground; these were not removed till 1852, when the natural operation of the thrust threw them down.)

But men must be taken to know the natural consequences of certain acts. If certain pillars, no matter at what depth, sustained the earth, all persons must be aware that the removal of those pillars must occasion the fall of the land above them. The plaintiffs were bound at that time to bring the action.

(THE LORD CHANCELLOR.—How can there be a wrong for which a man is bound to seek redress if he has no notice of it?)

The case of a solicitor taking a security on a bad title is a case of that kind, which, though not quite parallel with the present, is an illustration of the rule that a right of action may exist and the statute operate on it, though the party injured did not know of its existence. *Ashby* v. *White*, 2 Ld. Raym. 938, settled, that in the case of the violation of a right the law will presume a damage, and right of action will arise. This doctrine was expressly adopted in *Embrey* v. *Owen*, 6 Exch. 353, 368. Where, therefore, there is knowledge of an act done which all men know must produce damage, though the damage has not then actually arisen, the right of action is complete, and the statute comes into operation.

Mr. MANISTY and Mr. J. R. DAVISON, for the defendant in error.—The principle in *Nicklin* v. *Williams* need not be disputed, but that case does not apply here. When that case was decided, it was generally assumed that rights of the nature which exist here were mere easements, and the doctrines with relation to easements were too largely applied to them. It is now settled that they are not mere easements, but rights which exist *jure naturæ*, and are therefore governed by entirely different principles. Besides, the injury done there was known when the act was done, and an action was brought for damages and damages agreed to; and all that that case decided was, that consequential damage from the same cause would not afterward give a fresh right of action. The act done in this case was a perfectly innocent act at the time it was done; the argument on the other side is, that it must be treated as having been then injurious, because it might afterward become so. If the action had been brought when the act was first

done the answer would have been that the defendant had a right to do the act, and that no damage had been occasioned. In *Rowbotham* v. *Wilson*, Mr. Justice Creswell said (8 Ellis & B. 157), "the owner of the mines might have removed every atom of the minerals without being liable to an action if the soil above had not fallen. In such case the consequential damage is the cause of action, and the Statute of Limitations will run only from the time when the injury was sustained, and not from the time when the act was done." *Roberts* v. *Read*, 16 East, 215, is a distinct authority for that proposition, and that is the answer, too, to the case supposed on the other side, of a house situated between the lands of B and C, and being injured, not when B excavated his land, but when C did so too, and thus occasioned the effect of B's excavation to manifest itself. *Clegg* v. *Dearden*, 12 Q. B. 576, does not affect this case, for there the act done was wrongful at the time; here it was innocent at the time, and nothing but the consequential damage gave a ground of complaint. The same answer may be made to *Howell* v. *Young*, 5 B. & C. 259, and that class of cases where solicitors have accepted bad titles on investments of their clients' money.

Here the action is for an injury to the reversion, and it can only be maintained by showing that the reversion is really injured.

SIR F. KELLY replied.

THE LORD CHANCELLOR (LORD WESTBURY).—My lords, this case has been rendered of great importance by reason of a difference of opinion which existed between the majority of the judges in the Court of Queen's Bench, and the judges sitting in the Court of Exchequer Chamber. Your lordships have therefore deemed it right to hear the case at length; and I will now submit to your lordships the following question as fit to be proposed for the opinion of the learned judges who are in attendance: "A B is the owner of a house; C D is the owner of a mine under the house, and under the surrounding land; C D works the mine, and in so doing leaves insufficient support to the house. The house is not damaged, nor is the enjoyment of it prejudiced until some time after the workings have ceased. Can A B bring an action at any time within

six years after the mischief happened, or must he bring it within six years after the workings rendered the support insufficient?"

The learned judges asked leave to retire to consider this question, which, having been granted, they were absent for a short time; and on their return, the Lord Chief Baron said: My lords, I am desired by my learned brothers to deliver our unanimous opinion in reply to your lordships' question. We are all of opinion that A B may bring an action at any time within six years after the mischief done, and we are of that opinion for the reasons given in the judgment of the Court of Exchequer Chamber. (Ellis, B. & E. 654.)

THE LORD CHANCELLOR.—My lords, we are much indebted to the learned judges for giving an immediate answer to the question, and I think your lordships will agree with me, that no important doubt can be entertained upon the answer that ought to be given to it. I think it is abundantly clear both upon principle and upon authority, that when the enjoyment of a house is interfered with by the actual occurrence of the mischief, the cause of action then arises, and that the action may then be maintained. It is unnecessary to refer to the authorities that have been cited in the argument. I will only take this opportunity of observing that, with regard to the case of *Nicklin* v. *Williams*, the decision of that case is, I think, beyond all question. Some of the dicta which occur in that case, and which have been relied upon by the counsel for the plaintiff in error, are certainly not necessary for the decision that was there pronounced; but without going into the consideration of those dicta, I think that, for the reasons that were given in the Court of Exchequer Chamber, the judgment there pronounced in this case ought to be affirmed, and that this writ of error ought to be dismissed.

LORD BROUGHAM entirely agreed.

LORD CRANWORTH.—My lords, I am of the same opinion. I think the error in the view which has sometimes been taken upon this subject is this: it has been supposed that the right of the party whose land is interfered with, is a right to what is called the pillars or the support. In truth his right is a right to the ordinary enjoyment of his land, and till that ordinary enjoyment is interfered with, he has nothing of which to com-

plain. That seems to be the principle upon which this case ought to be disposed of; and it appears to me to be, to some extent, analogous to this sort of case. Suppose a slander to be uttered, which is not actionable in itself, but under which special damage may arise and does arise to somebody afterward, the person complaining of that special damage can bring no action till he has sustained actual damage. It is true that in such a case the express language of the Statute of Limitations prevents the bringing of any action after two years from the words spoken. But for that express provision, such a case would furnish an analogy to the case now under discussion. I will only therefore say, that both on the grounds stated by my noble and learned friend on the Woolsack, and on those expressed by the Court of Exchequer Chamber, I entirely concur in the opinion that the judgment below should be affirmed.

LORD WENSLEYDALE.—My lords, I entirely concur in the opinion which has been delivered by the learned judges. I think it perfectly clear that the right in this case was not in the nature of an easement, but that the right was to the enjoyment of his own property, and that the obligation was cast upon the owner of the neighboring property not to interrupt that enjoyment.

LORD CHELMSFORD.—My lords, I entirely concur with my noble and learned friends, and I can add nothing to what they have said.

Judgment of the Court of Exchequer Chamber affirmed with costs.

Lords Journals, 28th June, 1861.

WILLIAMS ET AL. v. BAGNALL ET AL.

(12 Jurist N. S. 987. Vice-Chancellor Wood's Court, 1866.)

[1] **Exception of minerals—with power to get them regardless of support.** The conveyances of an estate in a mining district, sold in lots, contained an exception of all mines and minerals under the land included in the lot conveyed with full power to the grantor to work, get, and dispose of them, without entering upon the land sold, but without being answerable for any injury to the land, or any buildings on it, by reason of working or getting the excepted minerals, and without being liable to any action or suit for any such injury: *Held*, that a purchaser of a lot was not entitled against the grantor to either vertical or lateral support for the surface of his land.

The question in this suit was, whether or not the plaintiffs, as the surface owners, were entitled to vertical and lateral support from the minerals under their land, under the following circumstances:

The plaintiffs were ironmasters, and they were entitled in fee simple to two small adjoining lots of land of 1,040 square yards and 3,467 square yards respectively, situated at Bradley, in the township of Bilston, in the county of Stafford, and, together with the adjacent lands, having formerly formed part of a freehold estate of upward of 70 acres, belonging to John Wilkinson, who had worked part of the mines underneath the surface. After his death, a great part of the surface land was sold by his trustee, James Kyrke, in lots, including those above mentioned, which were bought by the predecessors in title of the plaintiffs, and conveyed to them in fee by two indentures, dated respectively the 5th August, 1843, and the 30th December, 1854.

Both of these indentures recited that the manor of Bradley, and certain messuages and lands thereto belonging, of which the pieces of land thereby conveyed formed part, were (*inter alia*,) together with the mines in and under the same, vested in James Kyrke in trust for sale, and contained the following clause, after the description of the parcels: "Except and always reserved unto James Kyrke, his heirs and assigns,

[1] *Mine Hill Co.* v. *Lippincott*, 12 M. R. 555; *Smith* v. *Darby*, 13 M. R. 695; see 10 M. R. 696.

all mines and minerals whatsoever, lying and being in and under the land and premises therein before described, and thereby conveyed, with full power and authority to and for James Kyrke, his heirs and assigns, or other the person or persons for the time being who would have been entitled to the freehold reversion and inheritance of the hereditaments thereby conveyed, in case this conveyance had not been made, to work, get, raise, sell, and dispose of the same mines and minerals—without entering upon the land and premises, or any part thereof, for such purposes, and without being answerable for any injury whatsoever that should or might arise to the land and premises, or to any buildings that should at any time thereafter be erected upon the land, or any part thereof, by reason of the working or getting the excepted mines from under the same premises, and without being liable to any action or actions, or other suits at law or in equity, costs, charges, losses, damages, or expenses for or on account of any such injury or damage."

At the time of this suit there were standing upon part of the land in question a large iron manufactory and other works in the occupation of Mr. Reece, ironmaster, and David and Benjamin Rollason, cement and wire manufacturers, as tenants to the plaintiffs. These buildings did not, however, add appreciably to the weight of the soil above the minerals.

The defendant was the lessee of the mines or seams of coal and minerals under the land of the plaintiffs, and also under the lands adjoining thereto on every side except the north.

In the years 1863-4 the defendant worked the seam known as "The New Mine" coal under the plaintiffs' land and the adjoining land. The effect of his so doing was to cause the subsidence of the surface, and considerable damage to the property of the plaintiffs; but he claimed to be entitled so to work the mines by virtue of the express terms of the above reservations. A good deal of correspondence ensued, with a view, if possib'e, of some arrangement being come to between the parties. They failed, however, to come to terms.

Shortly after June, 1864, the defendant commenced working the thick coal seam under the plaintiffs' land, which, in consequence, sunk still further, and some additional damage was done to the buildings. The defendant also intimated his

intention of getting the last mentioned coal under the land adjoining the plaintiffs' land, and after some further correspondence the present bill was filed.

The plaintiffs allege that they were entitled to all such lateral support to their land as could be given by the land adjoining thereto, and the mines and minerals under such adjoining land, and also that the effect of the reservation was not such as to deprive them of the right of support from the underlying strata of coal and other minerals; and they prayed for a declaration accordingly, and also for an injunction to restrain the defendant from getting the minerals under the plaintiffs' land or the lands adjoining, so as to injure the plaintiffs' land or buildings, or so as to deprive the plaintiffs of any lateral or vertical support to which they were entitled; and also to restrain the defendant from doing anything by reason whereof the lateral or vertical support of the plaintiffs' land might be injured or interfered with, or the use and enjoyment of the land or the buildings by the plaintiffs or their tenants interfered with in any way.

The defendant, by his answer, submitted that the plaintiffs were not entitled to any lateral support which should prevent, or be inconsistent with, the working of the seams in the manner usual in the district, and that their claim to vertical support was precluded by the terms of the reservations in the conveyances; and he stated that his lessors had refused to admit the construction put upon those reservations by the plaintiffs, and insisted on his proceeding to work the mines in accordance with the provisions in the lease.

The evidence showed that it was well known in the district, that the sales of the different lots were made with similar reservations to those in the conveyances to the predecessors of the plaintiffs, and that if the construction contended for by the plaintiffs was correct, it would render the reservation and exemption from liability wholly nugatory, not only because what was the vertical support of one lot was the lateral support of the adjoining lot under similar reservations, but, because, owing to the expense, it would be impossible to work the mines except continuously, without regard to surface divisions.

THE ATTORNEY-GENERAL (SIR J. ROLT) and KAY, for the plaintiffs.

SIR R. PALMER and F. C. J. MILLAR for the principal defendant. INCE for a defendant in the same interest as the plaintiffs.

SIR W. P. WOOD, V. C.

The question in this case turns entirely on the words of the conveyance. The intention of the parties must be gathered from the four corners of the instrument. In *Harris* v. *Ryding*, 5 M. & W. 59, the surface had been granted, reserving only the mines, and the grantor had bound himself by express covenant not to damage the surface. The court said, therefore, that he was liable for the trespass, and also on the express covenant; and it seems to have been a reasonable construction. But are those principles of construction applicable to this deed? I must read all the clauses of it together. There are the recitals, the grant of the land in the largest form, excepting the mines in and under the lands (there being a question whether it is an exception or a reservation; but I do not think that important though it is to be construed with reasonable strictness) with power to work the mines without being responsible for any damage. The grantor has, therefore, done something more than reserve the mines. He has reserved them with the right to work them, without being responsible for damage. It was contended that a man could not derogate from his own grant, and that a grant of the surface included everything necessary for its support; but it is impossible for me to hold that the words here are otherwise than a plain contract that the grantor may work the mines without regard to the surface; and this disposes of the question as to the vertical support.

Then as to the lateral support, that appears to me to be in the same position. The contract is, that the defendant shall be entitled to raise the minerals, and work through the adjacent property. The express contract, in fact, covers the whole case; and any damage that may be done, either by vertical or lateral working, is within the reservation. The case has been ingeniously put on behalf of the plaintiffs; but it does not rest on any reasonable ground, and the bill must be dismissed, with costs.

JONES ET AL. v. WAGNER.

(66 Pennsylvania State, 429; 5 Amer. R. 385; B. & W. L. C. 608. Supreme Court, 1870.)

Surface support after severance. By partition, the surface was severed from the underlying coal, and the parts were allotted to different heirs, without any limitation as to the removal of coal. *Held*, that the owner of the coal could not remove it without leaving sufficient support for the surface.

[1] **Mines servient to support.** The mining property is servient to the surface to the extent of sufficient supports to sustain it, and on default the owners and workers are liable for damages.

Usage to the contrary. To control the rule of the common law, a usage to mine without observing this duty, must be so ancient and uniform in the particular region as to amount to a custom. Such custom must be so ancient that the memory of man runneth not to the contrary.

Sic utere tuo. The upper and underground estates are governed as other estates, by the maxim, *sic utere tuo ut alienum non lædas.*

Error to the District Court of Allegheny County.

Action on the case by Christian Wagner against Benjamin F. Jones and others. The declaration set out that the plaintiff was possessed of a piece of land containing four acres, and that the defendants removed the coal underlying the tract in "so negligent, careless and unskillful a manner, and without leaving proper pillars, ribs and supports," that the surface caved in, greatly damaging the land, the dwelling-house and other buildings, the fences and fruit trees, and prevented the plaintiff from having the full benefit and enjoyment thereof, etc.

The opinion makes sufficient further statement of the case.

The jury found for the plaintiff $1,000.

M. W. ACHESON, for plaintiffs in error.—The manner of mining is to be controlled by the custom in the coal region: *Smart* v. *Morton*, 30 Eng. Law & Eq., 385; *Rowbotham* v. *Wilson*, 8 H. of L. 348. The grant of coal in the soil gives the full right to dig and carry it away with all the means to obtain it: *Caldwell* v. *Fulton*, 7 Casey, 475; Sheppard's Touch-

[1] *Livingston* v. *Moingona Coal Co.*, 10 M. R. 696; *Horner* v. *Watson*, 14 M. R. 1.

stone, Ch. 5, p. 89; and is inconsistent with any dominion in another: *Clement* v. *Youngman*, 4 Wright, 341; *Brown* v. *Corey*, 7 Id. 495; *Penna. Salt Co.* v. *Neel*, 4 P. F. Smith, 9; *Whitaker* v. *Brown*, 10 Wright, 197; *Turner* v. *Reynolds*, 11 Harris, 199; *Irwin* v. *Covode*, 12 Id. 167. The defendants were bound to use their rights carefully, in accordance with the established practice of mining: *Radcliff* v. *Mayor of Brooklyn*, 4 N. Y. 185; *Clark* v. *Foot*, 8 Johns. 421; *Frankford Co.* v. *The Phila. Railroad*, 4 P. F. Smith, 345; *Panton* v. *Holland*, 17 Johns. 92; *Rockwood* v. *Wilson*, 11 Cushing, 221; *Bentz* v. *Armstrong*, 8 W. & S. 40; *Haldeman* v. *Bruckhart*, 9 Wright, 514; *Wheatley* v. *Baugh*, 1 Casey, 528; *Smith* v. *Kenrick*, 7 Mann., G. & S. 515. Proof of usage is admissible to interpret a contract: 1 Greenlf. Ev. §§ 292, 294; 2 Parsons on Cont. 49; *Dwight* v. *Whitney*, 15 Pick. 179; *Stultz* v. *Dickey*, 5 Binn. 285; *Aughinbaugh* v. *Coppenheffer*, 5 P. F. Smith, 347; Taylor's Land. & Ten. §§ 350, 538, 554; *Van Ness* v. *Pacard*, 2 Peters, 137; *McCullough* v. *Irvine*, 1 Harris, 438. The house having been built after the partition, the right to a support for the soil does not extend to the building: Washburne on Easements, 441 *et seq.*

S. M. RAYMOND and C. B. M. SMITH, for defendant in error. —By the partition a servitude to support the soil was imposed on the coal estate: Washburne on Easements, 16, 17; *Kieffer* v. *Imhoff*, 2 Casey, 438. The contract rights of the parties can not be controlled by custom: *Stoever* v. *Whitman*, 6 Binn. 416. To establish a custom the right must be ancient, certain, uniform and reasonable: *Rapp* v. *Palmer*, 3 Watts, 179; *Newbold* v. *Wright*, 4 Rawle, 212; *Coxe* v. *Heisley*, 7 Harris, 243; *Foley* v. *Mason*, 6 Md. 37; *Jordan* v. *Meredith*, 3 Yeates, 318; *Henry* v. *Risk*, 1 Dallas, 265; *Frith* v. *Barker*, 2 Johns. 327; *Brown* v. *Jackson*, 2 Wash. C. C. 24; *Holmes* v. *Johnson*, 6 Wright, 159. The surface is entitled to support from the subjacent soil: *Humphries* v. *Brogden*, 1 Eng. L. & E. 241; *Harris* v. *Ryding*, 5 M. & W. 59; *Earl of Glasgow* v. *H. & C. Alum Co.*, 8 Eng. L. & E. 13; *Farrand* v. *Marshall*, 19 Barbour, 380; *Richardson* v. *Vermont Railroad*, 25 Vermont, 465.

The opinion of the court was delivered by THOMPSON, C. J.

The piece of ground out of which the controversy in this case has arisen, formerly belonged to John Ormsby's estate, and in the partition of that estate in November, 1855, the minerals in, and the surface of the land were separated and made to constitute two separate and distinct properties or estates without any restriction, limitation or servitude imposed on either, and were so allotted among two of Ormsby's heirs. The plaintiff claims title to the surface through the heir to whom it was allotted, and so do the defendants to the minerals from another heir to whom they were allotted.

The question in the court below and here, is whether the latter have by their unrestricted title, the right to mine and take out *all* the coal underlying the surface, without liability for injury thereto, or to buildings and improvements thereupon by subsidence or otherwise. The learned judge below reserved the point and submitted to the jury the question of injury; to what amount, and whether it arose from unskillful or negligent mining in not leaving sufficient pillars or props in the mine to sustain intact the surface. On this question the jury found for the plaintiff, and at a subsequent day the court ruled the reserved question also in his favor and entered judgment on the verdict. From this statement it will appear that the only negligence or unskillfulness at all attributable to the defendants, if any, arose from not leaving sufficient pillars of coal or supports to sustain the surface, and this they undoubtedly did not, most probably under the belief that all the coals in the mine belonged to them by virtue of their purchase and title. This was certainly true with the exposition of such a right given by Baron Parke in *Harris* v. *Ryding*, 5 M. & W. 60: "I do not mean to say," observed that able judge, "that all the coal does not belong to the defendants, *but they can not get it without leaving proper supports.*"

The right of supports, *ex jure naturæ*, which the owner of the soil is entitled to receive from the minerals underneath, has, within comparatively a few years, received much attention in the courts in England, and the rule deducible from the cases in all the courts, the House of Lords, Exchequer and Queen's Bench, is, that where there is no restriction or contract to the contrary, the subterranean or mining property is subservient to the surface to the extent of sufficient supports

to sustain the latter, or in default, there is liability to damages by the owners or workers of the former for any injury consequent thereon to the latter. This is fully supported by *Harris* v. *Ryding*, 5 M. & W. *supra*, determined at Easter Term 1839, in the Exchequer; *Humphries* v. *Brogden*, 1 Eng. Law & Eq. 251 (1850), in the Queen's Bench before Lord Campbell C. J., and Patteson, Coleridge and Erle, JJ. The whole question was there discussed most learnedly and ably by the Lord C. J., and the same result arrived at as had been in the Court of Exchequer, *supra*, and in the case of *The Earl of Glasgow* v. *The Hurlet Alum Co.*, House of Lords in 1850, 8 Eng. Law and Eq. 13. There are many other cases referred to in the English courts to the same effect, by Rogers on Mines, p. 455, *et seq.* Among them are *Rowbotham* v. *Wilson*, 8 H. L. Ca. 348, *Pinnington* v. *Galland*, 9 Exch. 1, for the principle stated by the learned author at page 467: "That if an owner of lands grant a lease of the minerals beneath the surface with power to work and get them in the most general terms, still the lessee must leave a reasonable support for the surface, and so, conversely, where the minerals are demised and the surface is retained by the lessor, there arises a *prima facie* inference at common law, upon every such demise, that the lessor is demising them in such a manner as is consistent with the retention by himself of his own right of support." These citations prove two things, viz.: that the owner of a mineral estate, if the law be not controlled by the conveyance, owes a servitude to the superincumbent estate, of sufficient supports; consequently the failure to do so is negligence, and so may be declared upon: *Humphries* v. *Brogden*, *supra*.

A usage to mine without the observance of this duty by defendants must have been so ancient and uniform in the region in which the property is situated, as to amount to a custom or usage capable of controlling the rule of the common law cited above, and of becoming the law itself. One element of such a custom would be, that it is so ancient "that the memory of man runneth not to the contrary." This could not be, and was hardly pretended of the locality in question. Nor is it likely that in a business like mining bituminous coal, found only in the western counties of the State, there ever was any rule there other than that which would result from convenience.

As to the house in question damaged, it undoubtedly had a right to supports as incident to the ground on which it stood. What might be the consequence of building in an unreasonable manner, taking into view the mining rights beneath, on a question of the sufficiency of the supports, does not arise in this case and need not be decided.

We have no case strictly of authority in our books, nor do I find any in the books of our sister States. In most of them but little subterranean mining exists, and in others the question has not presented itself for adjudication. In none of the cases cited by the learned counsel from our State reports, is the question decided or intentionally touched; we therefore must rule the point for ourselves for the first time. The English cases referred to, and others which might be referred to, emanate from great ability, and from a country in which mining, its consequences and effects, are more practical, and the experience greater, than in any other country of which we possess any knowledge. We think it safe, therefore, to follow its lead in this matter, and hold that in the case in hand the recovery was right, predicated as it was of the want of sufficient supports in the mine to prevent the plaintiff's ground, house and orchard, from injury by subsiding into the cavity made in the earth by the removal of the coal. The upper and underground estates being several, they are governed by the same maxim which limits the use of property otherwise situated, *sic utere tuo et alienum non lædas.* We have no doubt but all the evils deprecated by the adoption of this rule will disappear under regulations adapted to each case of severance of the soil from the minerals. Contract may devote the whole minerals to the enjoyment of the purchaser, without supports, if the parties choose. If not, the loss by maintaining pillars or putting in props will necessarily come out of the value of the mineral estate. If at any time the public necessities may demand the pillars to be removed for fuel, we may safely assume that the same necessity will provide some rule which will be satisfactory in such a crisis. We think the case was well decided below, and that the *judgment must be affirmed.*

SMITH v. DARBY ET AL.

(L. R., 7 Q. B. 716. Queen's Bench, 1872.)

[1] **Power, under lease, to win without leaving pillars.** Defendants were sued for mining under plaintiff's land without leaving proper supports, whereby plaintiff's buildings were undermined and fell. Plea, a lease from the plaintiff's grantor, prior to plaintiff's purchase, demising the minerals for thirty-eight years, with full power to get the minerals, and with special covenants as to compensation for damages done to buildings erected or to be erected, or to crops, with the option of repairing such buildings, etc. Conclusion, that defendants were assignees of such lease, and were always ready to perform the covenant. On demurrer, it was *held*, that the plea was good; for that the terms of the lease were sufficient to show by implication that it was intended that the lessees of the mine should have the right to work the mine so as to undermine the surface—subject to paying damages according to the covenants.

Right of support yielded by grant. The right of support to the surface may be divested by grant to the party working the minerals, and the subsequent purchaser of the surface will take subject to such grant.

The remedy at common law is not cumulative to the remedy upon contract when the common law right has been merged in an agreement lawful in all respects.

Defendants were sued for damages on account of injuries to buildings arising from working out the mines underneath. They set up in their pleas a lease of the minerals from the then owners in fee for a term of years, which lease contained the following covenant:

And, further, in case any damage or injury during the term hereby granted shall happen to any of the dwelling-houses, cottages, or other buildings already erected, or to any dwelling-houses, cottages, or buildings, to be hereafter erected on the estate of the lessors, in the parish of Dawley aforesaid, in lieu and stead of any of the present erections or buildings, and not of greater value than the present buildings were when erected, by reason of any coals, ironstone, or other minerals being got under them or any of them, or so near to them or any of them as to occasion such injury or damage, that then the said lessees, their executors, administrators and assigns, shall and will at their own costs and charges, on six days

[1] *Williams* v. *Bagnall*, 13 M. R. 686.

notice to them given by the lessors or assigns, or their tenants, rebuild, repair, and find materials, and carriage of materials, for the building and repairing any such messuages, cottages, and other buildings so damaged and injured by the means aforesaid, and put and make such messuages, cottages, and other buildings, in as good state, condition and repair, as they were before such injury or damage was done or happened to them respectively. And, further, that they, the said lessees, their executors, administrators and assigns, shall and will yearly and every year on the 25th of March in each year during the term hereby granted, well and truly pay or cause to be paid unto the said lessors and assigns, over and besides the immediate damage or injury occasioned to the stock or crops of the tenant or occupier of the lands so to be damaged (which is to be paid for to the said tenant or occupier) a satisfaction for all damages and trespasses which shall be by them sustained, or which hereafter shall be done or committed by the said lessees, their executors, administrators and assigns, agents, workmen, carriers or colliers, by getting the said mines and minerals, after the rate of 40 *s.* per acre per annum for and during the first five years from the commencement of such damage, and so in proportion for any greater or less quantity than an acre. And from and after the expiration of the said term of five years from the commencement of such damage shall and will well and truly pay or cause to be paid to the said lessors or assigns, such a price or value for the land so to be damaged as aforesaid as shall be fixed thereon by two indifferent persons, one to be chosen by each party, and in case such two persons shall not agree, then such a price as shall be fixed by such one person as the two persons so to be appointed as aforesaid shall name as their umpire, whose determination shall be final, the value of each acre of the said land prior to such damage done being reckoned by the arbitrators or umpire at £60 per acre; and on payment of such sum as such arbitrators or their umpire shall so fix, together with interest thereon, after the rate of £5 per cent. per annum after the expiration of the said term of five years, (when the said damage rent of 40 *s.* per acre is wholly to cease), to the time of the actual payment of the said estimated damage, the said lessees shall have the free use, possession, and enjoyment

of the land which shall be so damaged for the then residue of the said term of thirty-eight years or other further term to be granted as hereinafter mentioned, without paying any further consideration for the same by way of rent or otherwise howsoever.

Said lease was prior to the plaintiff's title to the surface. The pleas further showed readiness at all times to pay damages according to the terms of the covenant. Certain of the pleas were demurred to and to the others replications were filed.

DOWDESWELL, Q. C. (G. SHAW with him), for plaintiff.

BOSANQUET, for the defendants.

BLACKBURN, J.

I think that judgment must be for the defendants. There is no doubt about the rights of the grantee of minerals, and they can not be more accurately stated than by Lord Wensleydale in *Rowbotham* v. *Wilson*, 8 H. L. C., at p. 360: "There is no doubt that, *prima facie*, the owner of the surface is entitled to the surface itself and all below it *ex jure naturæ;* and those who claim the property in the minerals below or any interest in them must do so by some grant from or conveyance by him, or, it may be, from the Crown, as suggested by Lord Campbell in the case of *Humphries* v. *Brogden*, 12 Q. B. 739. The rights of the grantee to the minerals, by whomsoever granted, must depend upon the terms of the deed by which they are conveyed or reserved when the surface is conveyed. *Prima facie*, it must be presumed that the minerals are to be enjoyed, and therefore that a power to get them must also be granted or reserved as a necessary incident. It is one of the cases put by Sheppard (Touchstone, Chap. 5, p. 89) in illustration of the maxim "*Quando aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit*," that by the grant of mines is granted the power to dig them. A similar presumption, *prima facie*, arises that the owner of mines is not to injure the owner of the soil above by getting them, if it can be avoided. But it rarely happens that these mutual rights are not precisely ascertained and settled by

the deed by which the right to the mines is acquired, and then the only question would be as to the construction of that deed, which may vary in each case." In that particular case there were difficulties under an Inclosure Act, and other points were raised. But the point which Lord Wensleydale said was sufficient to decide the matter was this: Pears, through whom the plaintiff claimed, had executed a deed, and whether he was the owner of the surface at the time or not, subsequently, at all events, the title accrued to him; and Lord Wensleydale says that the covenant in the deed would, by estoppel, be operative as a grant to take the minerals absolutely. The covenant was one in which the different parties who had taken the surface and the minerals very clearly expressed their intention that the minerals might be taken without making compensation for the surface sinking; and Lord Wensleydale says, "Pears would still be bound by the deed which he executed, which would operate as a grant of the right to win the coals in such a manner as might injure the superjacent land." (8 H. L. C. at p. 364.) That case, being in the House of Lords, is binding upon us. *Prima facie*, it is to be taken, that where the minerals are granted the grantee is to take them in such a way as to leave sufficient support; but the question comes to be whether it sufficiently appears, upon the present deed, what the parties intended. It appears that, when this grant was made, there were houses and buildings on part of the land, and on part there were no houses and buildings. By the deed was granted, in general terms, full liberty to enter, and work, and take the minerals, with this important clause: "they, the lessees, their executors, administrators and assigns, making reasonable satisfaction to the lessors, their heirs and assigns, and their tenant and tenants, for the damage done to them respectively by the surface of their lands being covered with rubbish or otherwise injured, or as he or they should or might sustain, as well by the injury done to the lands of the said lessors in sinking and getting the said mines and minerals and converting coal into charcoal, as for such damage or injury as might be done or caused in the dwelling-houses or other buildings of the said lessors by getting mines of coal, ironstone, or other stone or other minerals under or near to any of the dwelling-houses or other buildings of the said les-

sors, according to the covenant thereafter contained." I quite agree with Mr. Dowdeswell that, *prima facie*, what would be meant by a deed which grants the ores and minerals would be a grant to take them, but leaving sufficient support for the surface. But does not this deed say, "You may take them absolutely, only making compensation afterward?" I can not agree that there is any argument to be derived from the use of affirmative words only, without any negative words. The question is, what was the intention of the parties to the deed, when there is an affirmative promise to pay money to the tenants, and what was the bargain as to the sale of the property. If the owner of a horse said, "You may take the horse," and the person to whom this was said had promised to give £20 for it, there is no question that he could not be sued in an action of trespass for taking the horse, because the intention of the parties was that the one was to buy and the other sell the horse. So here the question is: whether it appears upon the clauses in the deed that the intention of the parties was that the minerals should go absolutely, without any restriction as to the right of support; and if it appears that compensation must be paid for that in a particular way, it shows that the intention was that they should be so taken. I think it does here sufficiently appear that there was such an intention. The words I have already read go as far as this: they contemplate the getting the minerals under the houses, paying for such damage or injury as might be done or caused in the dwelling-houses or other buildings of the lessors by getting the minerals under or near any of them. That, *prima facie*, would mean, "You must pay compensation for taking the minerals under the houses and not leaving sufficient support." Then the covenant carries this still further. (The learned judge read the covenant.) On payment of the compensation awarded, the lessees are to have "the free use, possession, and enjoyment of the land which shall be so damaged for the then residue of the term." Taking these things together, it seems to me to be plain that the bargain of the parties was this: "You, the grantees, shall have the minerals, not, as is usually the case, to win them, leaving, as you would be, *prima facie*, supposed to do, sufficient support for the surface; but you shall have them absolutely, without being obliged to leave the support, and if you do any damage by bringing down

the surface, you shall pay for taking away the minerals without leaving support, in the way we afterward provide;" and the fact of the grantees affirmatively promising to make compensation to the grantors seems to say on the grantors' part, "We have sold you the right of support." This seems to me, therefore, as complete and good a bargain and sale as that of the horse; and it follows that the plaintiff has no other remedy than that given him by the covenant. Consequently the pleas are good, and the replications bad.

MELLOR, J.—I am of the same opinion. The Messrs. Slaney were the owners both of the surface and of the mines. By the lease they separated the surface from the mines, giving a power to the lessees to work the mines, in the fullest manner that such a power can be given. But I agree that, if there had been nothing else in the instrument to negative the presumption, it would have been open to the suggestion that the grant must be subject to the right of support to the surface: which is always presumed, unless an intention to the contrary appears either expressly or by necessary implication. There is no doubt that the power conferred to work the mines in any manner and to get all the coal is very extensive. And the compensation for the damage, which it was contemplated by the parties might arise from the working, is to be made according to the covenant contained in the deed for that purpose; and in order to construe the grant and to ascertain whether or not the right of support was incident to it, or whether the intention was to dispense with it, we must look to the covenant, construing that and the grant together. I can not but think that the intention of the parties may be thus expressed: "I grant you the absolute right to get all the coals, but certain damage may result; houses may be let down or damaged, and so on; in case such damage arises you must restore or repair the houses, and in case you have to substitute one building for another you shall not be required to substitute one of greater value than the value of the one at present on the premises." The parties had under their consideration the extent and nature of the injury for which they intended that the grantee of the mines should compensate. And the language, I think, shows an intention on the part of the lessor and the lessee to limit the damages as expressed in that covenant; and I think it would

be a very great hardship on a lessee who thought he had guarded against being open to indefinite damages, if he should be liable to be told, "You have not done that; that is only a cumulative provision; you are still liable for any damage you may do, just as much as if you had entered into no such covenant." The case that most weighed upon my mind was *Smart* v. *Morton*, (5 E. & B. 30); but it appears clear from the expressions used in *Rowbotham* v. *Wilson* (8 H. L. C. 348), that the parties are not limited to particular stipulations. The man who grants the minerals and reserves the surface is entitled to make any bargain that he likes; both parties are just as much at liberty to make a bargain with reference to coals and minerals, as to make a bargain with reference to anything else. And when I find a bargain, as it appears to me, expressing the intention of the parties, it gets rid of all the difficulties which were very forcibly and ingeniously urged. I agree entirely in the judgment which my brother Blackburn has pronounced, and must say that the pleas are good, and that the replications are bad.

LUSH, J.—I am of the same opinion. I take it to be well established by the cases that a grant of all the minerals under certain lands, without more, must be read, not as meaning a grant of all the minerals that may be found under those lands, but of all the minerals that can be taken away from under those lands without disturbing the surface. And if to that grant be superadded provisions for compensation for damage done to the surface, if the words giving compensation can be fairly satisfied by reference to acts done on the surface, though they may be large enough to extend to damage done to the surface by taking away the support, still they must be read as confined to acts done on the surface, the presumption being that the grantor did not intend to enable the grantee of the minerals to take away the support from the surface soil. Now if the words of this lease contained only phrases of that description capable of being satisfied by reference to acts done on the surface, I should agree with Mr. Dowdeswell that they did not confer power on the lessees to take away the minerals without leaving support under the surface soil. But the words are not capable of being so read; you can not satisfy the terms of the grant without imputing to the grantor an intention to enable

the grantee to take away all the minerals he may find there, though the effect of the working may be to let down the surface land. The words of the grant are in general and very extensive terms. (The learned judge read the grant.) Then comes the condition, "they, the said lessees, making reasonable satisfaction to the said lessors and their tenants for the damage done to them, respectively, by the surface of their land being covered with rubbish or otherwise injured, or as he or they should or might sustain, as well by the injury done to the lands of the said lessors in sinking and getting the said mines and minerals, and converting coal into charcoal." * * * Had it stopped there I should have agreed with Mr. Dowdeswell that all those terms might have been satisfied by referring to injuries done on the surface, sinking pits on the surface, or bringing rubbish upon the surface. But they are large enough to be applied to damage done to the surface by mining operations underneath. In what sense they are used is to be ascertained, I think, by the words which follow: "As well by the injury done to the lands of the said lessors in sinking and getting the said mines and minerals, and converting coal into charcoal, as for such damage or injury as might be done or caused in the dwelling-houses or other buildings of the said lessors, by getting mines of coal, ironstone, or other stone or other minerals, under or near to any of the dwelling-houses or other buildings of the said lessors, according to the covenant hereinafter contained for that purpose." Here, therefore, is contemplated injury to dwelling-houses and other buildings on the surface by mining operations. That can not mean, injured by any acts done on the surface; it must mean from mining operations below. That is more clearly shown when you come to the covenant for compensation. (The learned judge read the covenant.) It clearly appears from that covenant that the parties contemplated that the mining operations authorized by the lease might result in injury to the surface and to the buildings upon it, even to their destruction. That gives a meaning to the words of the grant which I have already read, and shows that the parties had in their contemplation that the surface soil might be greatly disturbed by the mining operations which it was intended should be carried on by virtue of the lease. This is further confirmed by the pro-

visions by which the lessees are bound to a certain extent to make compensation. Therefore, I think, taking the whole of the deed together, it is clearly shown that the intention of the parties was that the lessees should take away all the minerals they found, even though the effect might be to injure the surface, only making such compensation as was therein provided.

Judgment for the defendants.

INDEX.

ABANDONMENT.

1. *The inference of abandonment* of a right from *non-user* not applicable to the case of mines. *Seaman* v. *Vawdrey*, 62

ACCOUNT—See TENANT IN COMMON, 2.

ADVERSE CLAIM.

1. *Effect of notice required by the statute.*—The notice required by the statute to be given by the register of the land office, as well as by the claimant, is in effect a summons to all adverse claimants. *Wolfley* v. *Lebanon M. Co.*, 282

2. *The adverse claimant may recover the vein adversed, although a separate vein*, if found within the lines of his older and better location, to the extent that it is so found within the lines of such location. *Freeland* v. *Hoffmann*, 289

3. *The burden of proof is upon the adverse claimant* to establish his case by a preponderance of evidence. *Id.*

ADVERSE POSSESSION.

1. *Non-user of mine.*—The non-user of a mine reserved in a deed of land will not, of itself, extinguish the right of the mine owner. The surface owner, to effect an adverse possession, must do some act hostile to the rights of the mine owner. *Marvin* v. *Brewster Iron M. Co.*, 40

2. *Adverse possession after severance of the mineral title.*—More than seven years notorious peaceable and adverse use of gold mines, where the party has gone into possession under deed, will give a statutory right notwithstanding the vendor's reservation of the exclusive privilege of working such mines. *House* v. *Palmer*, 104

3. *Adverse possession by mining.*—If the owner of a mine is not in actual possession, and any person digs pits or drives adits, and carries on mining operations continuously for twenty-one years adversely to the right of any other, he may acquire a right; in such case he takes possession of the entire body of minerals in the land. *Armstrong* v. *Caldwell*, 253

4. *Court to determine what possession gives title—Use of coal by family.*—The court below left it to the jury to find that the plaintiff had acquired title to the coal, by having taken it out for family and neighborhood uses at intervals for twenty-one years, without evidence that the taking had been constant and continuous. *Held*, error. *Id.*

5. *Possession a question of law.*—It is for the court to say what kind of possession is necessary to give title by statute. *Id.*

6. *Burden of proof on the adverse occupant.*—The first entry of the grantee to mine having been made more than twenty-one years after the

ADVERSE POSSESSION. *Continued.*

grant, the court instructed the jury that the statute was *prima facie* a bar. *Held*, to be error, the presumption being that the possession accompanied the title; the burden was on the plaintiff to show that he had taken and maintained adverse possession. *Id.*

See SEVERANCE 5, 12; STATUTE OF LIMITATIONS.

AGENT.

1. *Letters proving agency submitted to jury.*—If a court fails to construe certain letters and telegrams touching the agency of defendant, but leaves the question to the jury, the defendant can not complain if the letters clearly show his agency, and the jury so find. *Pence* v. *Langdon*, 32

2. *Agency a question of fact.*—Whether a person is acting as the agent of a corporation or of an individual shareholder in a certain transaction for the purchase of stock, is a question of fact for the jury. *Kelsey* v. *Northern Light Co.*, 497

See ATTORNEY IN FACT, 1; BILLS AND NOTES, 1.

AMENDMENT.

1. *Leave to amend a hopeless bill*, will not be given. *Pollard* v. *Clayton*, 335

See STATUTE OF LIMITATIONS, 8.

APPEAL.

1. *Action for continued injury not prevented by appeal pending.*—The pendency of an appeal from an action concerning the diversion of water does not prevent the bringing of new actions for continued diversion, nor is the Statute of Limitations suspended by the appeal. If plaintiff delay action for more than the statutory period, the original case standing in the meantime on appeal, he can not recover beyond the statutory period. *Toombs* v. *Hornbuckle*, 430

2. *Practice in Court of Appeals on exceptions to evidence.*—If, upon objection to evidence, it is admitted by the court, subject to exception, and the party objecting does not at a later stage of the trial move the court to exclude such evidence, the question of its admissibility can not be raised in the appellate court. *Basshor* v. *Forbes*, 530

3. *Practice on appeal—Finding facts.*—Where the judgment of the appellate court is made as the result, wholly, or in part, of a finding of facts different from the finding in the trial court, it is made the duty of the appellate court to recite in its final order, judgment or decree, the facts found by it. If it does not, and no error of law is found in the record of the trial court, a judgment of reversal by the appellate court will be erroneous. *Coalfield Co.* v. *Peck*, 623

See DEPOSITIONS, 1.

ASSESSMENT.

1. *Forfeiture of stock—Ejectment no remedy.*—Plaintiff and others, owners of undivided interests in a possessory mining claim, became incorporate, and from that time worked the claim as corporate property. Assessments were levied upon the stock, and plaintiff's share was advertised and sold to pay his assessment; he then sued the company for an un-

ASSESSMENT. *Continued.*

divided interest in the claim: *Held*, that he mistook his remedy; if the stock was improperly sold, he could maintain an action for its recovery, but could not recover a specific interest in the corporate property. *Smith* v. *Maine Boys' Tunnel Co.*, 460

See PERSONAL LIABILITY, 4, 9; STOCK, 17–19, 40.

ASSIGNMENT.

1. *Suit by assignee of chose in action.*—Since the act of Congress of March 3, 1875, an assignee of a chose in action can prosecute an action concerning it, if founded in tort, without regard to the citizenship of the assignor. *Van Bokkelen* v. *Cook*, 421

See BROKER, 2; RESERVATION, 14, 22; STOCK, 16, 38.

ATTORNEY IN FACT.

1. *A verbal power is sufficient* to authorize an agent to sign the name of the grantor to a bill of sale of a mining claim, where the grantor has first agreed in person with the grantee upon the terms of sale. *Patterson* v. *Keystone M. Co.*, 171

See SEVERANCE, 9.

BAILMENT.

1. *Bailor's right to ratify.*—If the bailee of personal property sell it, in violation of his authority, the owner may ordinarily ratify the transaction and demand the proceeds of the sale. *Atkins* v. *Gamble*, 514

2. *General rule as to remedy of bailor for conversion.*—The owner of personal property which has been wrongfully converted, is ordinarily entitled to recover his specific property, or its value, and can not be compelled to accept other property of the same kind and equal in value in lieu of that which was converted. *Id.*

See STOCK, 22, 23.

BILLS AND NOTES.

1. *Proof of authority to make note.*—The authority of agents of a corporation must be shown. Proof that a promissory note purporting to be made by it was signed by the president and secretary is not sufficient without proof of their authority to sign it. (*Per* LOTT, Senator.) *McCullough* v. *Moss*, 440

See CORPORATION, 3; EVIDENCE, 5; STOCK, 25.

BLASTING.

1. *A mine owner can not be restrained from blasting in the night time*, as is usual in the mines, although it disturbs the sleep and thus affects the health of the owner of the surface and his family, or diminishes the value of his estate. *Marvin* v. *Brewster M. Co.*, 40

BROKER.

1. *Liability to broker for purchased stock—Readiness to deliver.*—Seal, a broker, bought stock on the order of Wynkoop, paid for it and informed him of the purchase. The stock was delivered to Seal; he frequently asked Wynkoop to take the stock, and although there might have been times when no stock was in his name, he could at any time have delivered it to Wynkoop, who never requested a delivery: *Held*, that Seal

BROKER. *Continued.*

could recover for the money advanced, and that Wynkoop was estopped from alleging that Seal could not comply, never having offered payment or demanded delivery, and Seal being ready to deliver at the time of trial. *Wynkoop* v. *Seal*, 493

2. *Idem—Temporary transfer of the stock by the broker.*—It was not error to refuse to charge that plaintiff could not recover because at some intermediate time the broker had not the stock standing in his name or had temporarily hypothecated it. *Id.*

3. *Broker's liability for stolen stock sold on commission.*—A broker received and sold certificates of stock in a California mining company, which were transferred in blank, and after deducting his commission and charges, paid over the balance of the proceeds to the person from whom he had received the stock. The stock had in fact been stolen, and the by-laws of the company provided that no transfer of stock should be valid, except between the parties thereto, unless entered on the books of the company: *Held*, that the broker was liable to the true owner for the value of the stock and damages. *Bercich* v. *Marye*, 544

CLAIM.

1. *Possessory "claims" are personal property*, do not rank above estates for years, and contracts relating to them are therefore within the power of an administrator. *Stewart* v. *Chadwick*, 236

See POSSESSION, 1; REAL ESTATE, 1.

CHANGE OF VENUE.

1. *Wrong place of trial, how remedied.*—District courts are courts of general jurisdiction, and the right to have a cause tried in particular counties is a personal privilege, which is waived if not claimed at the proper time and in the proper manner. If suit is brought in the wrong county the proper remedy is by motion for a change of venue, and not by demurrer. *Watts* v. *White*, 11

COAL—See SPECIFIC PERFORMANCE, 21.

COLLIERY—See SPECIFIC PERFORMANCE, 12; SURFACE SUPPORT, 12, 16.

COMMON LAW—See CONTRACT, 5.

CONSIDERATION—See STATUTE OF FRAUDS, 6.

CONTRACT.

1. *Where the words are clear*, there is no room for construction. *Benson* v. *Miners' Bank*, 107

2. *A contract to sell all the coal of certain beds* to certain works, is not one of monopoly or against public policy from the fact that it involves, by implication, a covenant not to sell to other parties. *Pollard* v. *Clayton*, 335

3. *Where the language of a contract is not ambiguous*, but of plain and obvious import, the rule is imperative to follow the language employed in its interpretation. *Hawley* v. *Brumagim*, 464

4. *Parol evidence, when admissible.*—Proof of any collateral parol agreement, or independent fact, which does not interfere with the terms

CONTRACT. *Continued.*

of the written contract, though it may relate to the same subject-matter is admissible; and whether such collateral agreement was made, or independent fact occurred, contemporaneously with, or as preliminary to the main contract in writing, is quite immaterial. *Basshor* v. *Forbes*, 530

5. *The remedy at common law is not cumulative* to the remedy upon contract when the common law right has been merged in an agreement lawful in all respects. *Smith* v. *Darby*, 695

See EVIDENCE; FRAUD; LOST PAPERS, 2; PERSONAL LIABILITY, 11; SPECIFIC PERFORMANCE, 10; TIME, 1.

CONVERSION.

1. *One who without the authority of the owner sells his property* is guilty of conversion although he has acted under the authority of one claiming to be the owner, and was ignorant of such person's want of title. *Bercich* v. *Marye*, 544

See MEASURE OF DAMAGES, 1; STOCK, 32, 33.

CONVEYANCE.

1. *Deed of bounty land prior to patent, void.*—Where land was located under a military land warrant issued under the act of Congress of May 6, 1812, a deed of it executed prior to the issue of patent is invalid. *Stephenson* v. *Wilson*, 408

See MISTAKE, 1; RESERVATION, 4; SALE.

CORPORATION.

1. *Implied right to purchase.*—Where the stated object of a company is to work a colliery, the right to purchase it is implied. *Baglan Hall Colliery Co., In re* 261

2. *Supply store by corporation—Shareholders' liability.*—A mining corporation may, under its general charter, keep a supply store out of which to pay its employes in kind, instead of money, and the fact that it sells these goods by retail to third persons is no ground for holding the stockholders liable as partners even if such sales be *ultra vires*. *Searight* v. *Payne*, 401

3 *The right of a corporation to make a promissory note* in the transaction of the business contemplated in its charter is recognized by the Revised Statutes. But it must affirmatively appear that it was made in the course of its legitimate business; the fact will not be presumed. *McCullough* v. *Moss*, 440

4. *Ratification of acts ultra vires.*—A corporation can not be bound by its agents for acts not within the powers conferred upon it by its charter. Contracts based on such acts are void and a subsequent ratification by the directors will not render them valid. Id.

5. *Lex loci domicilii.*—In a suit arising under a charter of another State, the decisions in that State are the best evidence of the rights and duties of stockholders under it. *Merrimac M. Co.* v. *Levy*, 467

6. *Company not responsible for stockholder.*—Where stock is purchased from a stockholder, no action will lie against the company for the recovery of money paid for such stock. *Kelsey* v. *Northern Light Co.*, 497

7. *Suit by stockholders in lieu of corporation.*—In an action by the stock-

CORPORATION. *Continued.*

holders of a corporation against the trustees, praying for an accounting and an injunction to stay waste, the answer denied the trust and also the existence of the corporation itself: *Held*, that this denial dispensed with the necessity of averring in the complaint that the trustees had been requested to institute an action in the name of the corporation for the redress of the grievances complained of, inasmuch as it was obvious from the answer that such a demand would have been refused; nor is it a defense that it was in the power of the plaintiffs to elect a new board of trustees, and thus cause an action to be brought in the name of the corporation. *Parrott* v. *Byers*, 505

8. *Trustees can not deny the charter.*—Parties who sign a certificate of incorporation and accept the office of trustees thereunder, can not, in an action against them for waste of the corporate property, etc., deny the validity of the act of incorporation. *Id.*

9. *Injunction—Stockholders against trustees—Sufficient proof of title.*—A board of trustees of a mining corporation denying the corporate ownership, and asserting title in their own right, and working the lode for their own benefit, may be enjoined at the suit of one or more stockholders, and in such case evidence of prior possession in the corporation and the entry by defendants as the trustees of such corporation, will support a finding in favor of the plaintiff, as to the ownership. *Id.*

10. *A corporation can not reduce its capital stock, by purchasing the shares of any stockholder.*—In order that such reduction may operate justly to all the stockholders, each stockholder should be allowed to surrender such proportion of his stock as the amount of the proposed reduction bears to the whole amount of capital stock. *Currier* v. *Lebanon Slate Co.*, 559

11. *A single shareholder can not constitute a meeting* of a company under the Stannaries Act. *Sharp* v. *Dawes*, 576

12. *Contract of corporation before incorporation.*—An agreement by the owners of a mine among themselves that a third party is entitled to 2,500 shares of the stock of a corporation which they are about to organize, on the payment by him of his *pro rata* of the purchase money paid for the mine, and of the expenses in working, is not the agreement of the corporation subsequently organized. *Morrison* v. *Gold Mt. M. Co.*, 578

13. *Publication in newspaper nearest to place of business.*—Under the provisions of an act requiring the publication of an annual report, "in some newspaper published nearest the place where the business of the company is carried on," if there is no newspaper in the town where the mines of the company are located, a publication in the newspaper nearest to such town, is a compliance with the statute, whether it be nearest the company mines situate in the town or not. *Cameron* v. *Seaman*, 584

See AGENT, 2; NOTICE, 2, 3; PERSONAL LIABILITY; PROSPECTUS, 1; SHARE; STOCK.

COSTS.

1. *Costs in equity—Specific performance cases.*—Costs in equity are in the discretion of the court, and if a plaintiff unreasonably enforce an equitable right, depriving defendant of an opportunity to satisfy the

COSTS. *Continued.*

claim made against him without suit, the relief may be granted without costs or plaintiff may be compelled to pay defendant's costs. *Welland* v. *Huber*, 364

See DEMAND, 1.

CUSTOM.

1. *Plea of custom, to what date referable.*—A plea that the defendants had done the acts complained of in accordance with the approved practice of mining, must be taken to refer to the practice at the date of the reservation, under which their alleged right accrued. *Smart* v. *Morton*, 655

See DISTRICT RULES, 1; SURFACE SUPPORT, 12.

DELIVERY—See SALE, 4.

DEMAND.

1. *Action for specific performance—Previous demand a matter of costs.*—Where a person has a right to a specific performance, such right depending upon the contract and not upon a breach of it, a demand of performance before suit brought is only important in reference to the costs of the action and has no bearing upon the merits or rights of the parties. *Welland* v. *Huber*, 364

See PROSPECTING CONTRACT, 1.

DEPOSITIONS.

1. *Use of depositions on appeal.*—Depositions filed but not preserved on the record, in a chancery cause, can not be used before the Supreme Court, on the trial of an appeal from the decree of the Circuit Court. *Bean* v. *Valle*, 292

2. *Waiver of objections to deposition.*—Although an exhibit to a deposition is objected to when produced by the witness, and the objection is noted in the deposition, yet, if the objection is not renewed at the trial it will not be considered on appeal. *Parrott* v. *Byers*, 506

3. *Commission to take deposition.*—A commission to take a deposition, issued in accordance with a previous order of the court, attested by the certificate of the clerk and under the seal of the court, is in compliance with the statute. *Smith* v. *North Am. M. Co.*, 599

DIP.

1. *Right to follow dip.*—Section two of the act of Congress of July 26, 1866, clearly permits the patentee of a lode mining claim to follow the lode in its descending course to any *depth*, although in its downward trend it is carried by dips, angles and variations, into the adjoining land. *Wolfley* v. *Lebanon Co.*, 282

DISCOVERY.

1. *Rights of discoverer—Conflicting evidence.*—Where the ownership of the additional claim by the discoverer at the time of such consolidation is admitted, it would require clear and positive evidence to show that he waived or relinquished his right thereto, or allowed it to be merged on equal terms with the claims of others, who had no additional rights as discoverers. And where in such case one witness declares that the discoverer assented to the division of his additional claim among the company, and another testified that he objected to such division, it was held his assent to such division was not proved. *Smith* v. *North Am. M. Co.*, 599

DISTRICT RULES

1. *District rules not required to have the age of customs.*—Mining customs, under the Nevada statute, may be proved, however recent the date or short the duration of their establishment. The common law doctrine as to customs, does not govern in such cases. *Smith* v. *North Am. M. Co.*, 599

See PATENT, 2.

DITCH.

1. *Ditch on school lands prior to act of 1866.*—The act of Congress granting the right of way to ditch owners can not affect land, the title to which had vested prior to its passage, although the ditch across such lands had been completed (according to the facts of the case) before the title to such lands had vested. *Natoma M. Co.* v. *Bugbey*, 211

DOWER.

1. *Dower in estate held in trust for husband.*—A widow has no estate, as such, in an interest in real estate held in trust by another, for her husband. Upon the death of the husband the right descends to his heirs at law, and when they have recovered the estate, she makes her claim of dower against them. *Stewart* v. *Chadwick*, 237

EJECTMENT—See ASSESSMENT, 1.

EQUITY—See EXECUTORS, 1; PERSONAL LIABILITY, 15.

ESTOPPEL.

1. *Inconsistent positions of counsel.*—Counsel can not claim that there was a written sale so as to exclude proof of a verbal sale and at the same time insist that such alleged sale in writing was void. *Patterson* v. *Keystone M. Co.*, 171

See INNOCENT PURCHASER, 2.

EVIDENCE.

1. *Proof beyond a reasonable doubt* implies that degree of proof which men would act upon in the most important affairs of life and such as would satisfy their judgments and consciences of the fact to be proved. *Stockbridge Co.* v. *Hudson Co.*, 120

2. *Instrument material if existent.*—A defendant claiming title under a written bill of sale must produce it or establish its loss before resorting to proof of its contents or proof of a verbal sale. *Patterson* v. *Keystone Co.*, 171

3. *Evidence of the assertion of a claim, distinct from its proof.*—The knowledge which an administrator obtains in the discharge of his duties may be sufficient to establish the fact that the estate asserts a certain claim, though it may not be sufficient to fix the validity of the claim, and is not hearsay evidence. *Stewart* v. *Chadwick*, 237

4. *Conflict of evidence.*—If the testimony is conflicting the judgment will not be disturbed on the ground that it is not warranted by the evidence. *Child* v. *Hugg*, 512

5. *Parol evidence to qualify note.*—Evidence of a parol agreement, at the execution of a note given for additional stock in a manufacturing com-

EVIDENCE. *Continued.*

pany, that the note was not to be paid except on a contingency, is inadmissible. *Hacker* v. *National Oil Co.*, 538

See ADVERSE CLAIM, 3; AGENT, 1, 2; CONTRACT, 1-4; MISTAKE, 1; SALE, 3; SEVERANCE, 7; STOCK, 39.

EXCEPTIONS—See RESERVATION; SURFACE SUPPORT, 13.

EXECUTOR AND ADMINISTRATOR.

1. *Contract of administrator inures to heirs.*—The contract of an administrator such as he had authority to make inures to the benefit of the heirs. *Stewart* v. *Chadwick*, 236

2. *Fraudulent administration—Equity jurisdiction.*—A Federal court, as a court of equity, has jurisdiction to call an administrator to account, who has defrauded the estate in the course of his trust, notwithstanding the probate court which appointed him has passed a decree finally settling his accounts and discharging him, the fraudulent acts not having been raised therein. *Van Bokkelen* v. *Cook*, 421

See PERSONAL LIABILITY, 6; STATUTE OF LIMITATIONS, 1; STOCK.

EXPERT—See RESCISSION, 1.

FORFEITURE.

1. *Shares forfeited between sale and suit.*—Where, after a fraudulent sale of mining shares and after demand to rescind and suit brought to set aside the sale, the shares became forfeited, both vendor and vendee, plaintiff and defendant, having full notice of the calls, the loss will fall upon the party against whom the decree ultimately goes. There is no engagement on the part of a plaintiff to maintain such property during a suit to set aside a fraudulent sale thereof. *Maturin* v. *Tredinnick*, 15

See ASSESSMENT, 1.

FRAUD.

1. *If persons make assertions of facts as to which they are ignorant*, whether such assertions are true or untrue, they become, in a civil point of view, as responsible as if they had asserted that which they knew to be untrue. *Reese River M. Co., In re* 20

2. *Knowledge of fraud as waiver—Burden of proof.*—A defendant who relies upon the neglect of the plaintiff to repudiate his fraudulent transaction, as a waiver of the fraud, has the burden of proving the plaintiff's knowledge of the fraud, and the time of its discovery. *Pence* v. *Langdon*, 32

3. *Notice of fraud perpetrated by a "friend."*—For certain purposes the law will presume a person to have notice of facts in respect of which he has been put upon inquiry, but if there are special reasons why one party should place trust and confidence in another, the law will not impose on him the necessity of absolutely ignoring the persistent asseverations of his "friend and neighbor" by whom he has in fact been defrauded, even though third parties may have told him that he had been "*sold.*" *Marston* v. *Simpson*, 36

4. *Fraud renders a contract voidable*, but does not make it void. *Foreman* v. *Bigelow*, 269

FRAUD. *Continued.*

5. *Sudden appreciation of mineral land—Value no proof of fraud.*—"Whoever is at all acquainted with the operations of mining, must know that a man may live on land for half a century, may dig into it often and deep, and discover nothing of value; another may thereafter, or he may himself thereafter, by one day's labor, discover a mine of great value." The fact of valuable lead diggings being opened on a tract purchased, within a short time after its purchase, is no evidence of a fraudulent concealment of its mineral value by the purchaser. *Bean* v. *Valle*, 292

6. *Waiver of right to rescind on account of misrepresentations.*—A purchaser of coal lands offering to perform his part of the contract, required by notice, the vendor to complete within a month: *Held*, that the purchaser could not afterward set up as a defense to a suit for specific performance, misrepresentation by the vendor, of which he was aware at the time of giving the notice. *Macbryde* v. *Weeks*, 347

See EXECUTORS, 2; PROSPECTUS, 1; RESCISSION; SHARE, 5; SPECIFIC PERFORMANCE, 5.

FURNACE.

1. *Furnace supply—Exchange of ores—Digging for sale.*—A party entitled to take ore to the extent of the supply of one furnace, where the furnace requires a mixture of ores, may rightfully take out ore to the extent of the quantity which the furnace can consume, for the purpose of using, in part for the furnace and in part for exchange for other ores, but may not extract ore for general sale. *Alden's Appeal*, 139

See RESERVATION, 23, 24.

GUARANTY.

1. *Guaranty against loss on sale of stock.*—In an action upon the following guaranty, "For one dollar to me in hand paid by Edward Strong, the receipt whereof is hereby acknowledged, I hereby agree to save and hold the said Strong harmless from any and all loss that he may sustain by reason of the purchase of the within named 3,000 shares of the Consolidated Gregory Company, and if any such loss is made I agree to pay the same to the said Strong, provided such loss shall occur within thirty days from this date." "James E. Lyon" (which was indorsed upon a bill of purchase rendered by plaintiff's broker), it appeared that the guaranty had been several times renewed and that during the time it was in force Strong purchased and sold many thousand shares of such stock. On the day before the last renewal expired he had sold 3,000 shares, at a loss of $33,322-.10 on the purchase price of the first 3,000 shares, for which sum he sued: *Held*, that the guaranty was only upon the stock first purchased, and its identity having been lost in the numerous purchases and sales by Strong, he could not recover. *Strong* v. *Lyon*, 554

2. *Idem—Renewals.*—The renewals having been made in ignorance of the facts did not extend the guaranty to other purchases. *Id.*

See PERSONAL LIABILITY, 2.

INJUNCTION.

1. *Injunction pending contest.*—Where the object of a bill in equity is to obtain specific performance of a contract, and the writ of injunction

INJUNCTION. *Continued.*

is prayed for only to protect the property—the subject of the contract—against the wrongful acts of the defendant, pending the contest, and until the right to specific performance shall be determined, that writ can not be maintained, unless the case presented by the bill would authorize a court of equity to enforce the contract. *Geiger* v. *Green*, 324

2. *No preliminary injunction where ultimate relief improbable.*—Upon an appeal against continuing an injunction, if the Court of Appeals perceives that the complainant has, and can have, no equity at final hearing, the bill will be dismissed. *Id.*

See BLASTING, 1; CORPORATIONS, 9.

INNOCENT PURCHASER.

1. *Innocent holder of unregistered stock.*—If the holder indorses the certificate by writing his name upon the back, without causing the same to be transferred upon the books of the company, and thereupon delivers it to a third person who loses it, an innocent purchaser from the finder acquires no title to the stock. *Sherwood* v. *Meadow Valley M. Co.*, 547

2. *Owner estopped from asserting title to stock.*—Where S., by her own voluntary act had, through misplaced confidence, conferred upon M. the apparent right of property in certificates of mining stock, and M. thereupon employed brokers to sell the stock, who did so in ignorance of the claim of S. thereto: *Held*, that S. was estopped from asserting title to the stock as against the brokers. *Stone* v. *Marye*, 593

3. *Title of innocent purchaser of stolen certificates upheld.*—W., being the owner of certain shares in the Belmont Mining Co., caused them to be transferred on the books of the company to "M., trustee," who indorsed the certificates in blank, and delivered them to W., but subsequently stole them from W. and sold them in market at full value to an innocent purchaser: *Held*, that the purchaser acquired a good title, and that W. could not maintain conversion against the company for a refusal to reissue the stock to him. *Winter* v. *Belmont M. Co.*, 595

4. *Stock, though wrongfully issued*, can not be declared void to the injury of an innocent holder. *Smith* v. *North Am. M. Co.*, 600

INSPECTION.

1. *Entry allowed to build support.*—Surface owners, by provision in decree, allowed to enter mines for the purpose of making supports to maintain buildings. *Dugdale* v. *Robertson*, 662

INTEREST.

1. *A decree directing repayment* of purchase money with interest until paid, is proper in a case where the contract is canceled. *Perkins* v. *Rice*, 8

2. *Interest* is chargeable on ore taken in excess of the quantity limited by the reservation. *Alden's Appeal*, 140

JURISDICTION.

1. *Extra territorial jurisdiction over mining claims.*—The late Superior Court of San Francisco had no jurisdiction of cases affecting real estate situate outside the city, and though it had jurisdiction to settle a

JURISDICTION. *Continued.*

mining partnership account between residents of San Francisco, it could not by its decree affect the title to a mining claim situate beyond such limits, by setting aside a sale of the claim. The fourth district court, taking the case by operation of law from the former court, possessed no greater powers in the case than the superior court. *Watts* v. *White*, 11

2. *Questions upon United States statute reserved.*—The constitutionality and proper construction of that portion of the act of March 3, 1875, which confers original jurisdiction upon the circuit courts of all suits "in which there shall be a controversy between citizens of different States," not decided. *Van Bokkelen* v. *Cook*, 421

See ASSIGNMENT, 1; PERSONAL LIABILITY, 10.

LACHES.

1. *Excusable delay is not laches.*—The delay of a party to a deed reserving ore, to bring suit to reform a mistake in the reservation, when the delay was based on his construction of the contract which had been originally assented to by the other party, is not *laches*. *Stockbridge Co.* v. *Hudson Co.*, 121

See RESCISSION, 3, 6; SPECIFIC PERFORMANCE, 5, 11, 14.

LEASE—See RESCISSION, 8; STATUTE OF FRAUDS, 3-5; SURFACE SUPPORT, 9, 16.

LIEN—See STATUTE OF FRAUDS, 6.

LODE.

1. *Side veins.*—Where a party owns a vein extending throughout his location, he may claim all other veins within the lines of such location. *Freeland* v. *Hoffman*, 289

See DIP, 1; DISCOVERY, 1; SIDE LINES, 1.

LOST PAPERS.

1. *Insufficient proof of loss.*—Proof of the loss of a written instrument is not established by showing that of three persons who may have it, two are unable to find it; inquiry should be made of the third. *Patterson* v. *Keystone Co.*, 171

2. *Party bound by statement of witness.*—Where the witness called by a party to prove a transfer says that such transfer was in writing, the party is bound by the statement of the witness and must produce the writing or account for it. *Id.*

MANDAMUS—See STOCK, 30, 31.

MEASURE OF DAMAGES.

1. *Measure of damages for conversion of stock.*—The measure of damages in trover for the conversion of mining stock is its market value; but in the statutory action of claim and delivery of personal property, in case return be not made the value at time of trial with the addition of dividends since conversion is the only complete remedy. *Bercich* v. *Marye*, 544

2. *The measure of damages is the value of stock at date of decree*, where the wrong complained of is a case of mistake, and not the act of a willful wrongdoer. *Smith* v. *North Am. M. Co.*, 599

MEASURE OF DAMAGES. *Continued.*

3. *Certain sales insufficient to fix market value.*—Sales of stock which operators could only induce their neighbors and acquaintances to take at uncertain and cheap rates, do not give market value to stock, but indicate an effort to give it an apparent market value. *Fitz* v. *Bynum.* 612

See STATUTE OF LIMITATIONS, 9.

MINERAL LANDS.

1. *Mineral lands included in grant for school purposes.*—The act of Congress of March 3, 1853, which granted to the State of California the sixteenth and thirty-sixth sections of public lands for school purposes, was designed to and did include mineral lands. *Higgins* v. *Houghton,* 195

See SCHOOL LANDS.

MINERALS.

1. *Where the land was known to contain minerals of some character* although the proper name and real value were unknown to the parties, a reservation of "all" minerals, although used in connection with a particular mineral, *held* to be an unqualified exception of all minerals in the reservation in contention. *Gibson* v. *Tyson,* 72

2. *All ores, treated as all known ores.*—The fact that the granting clause covered all ores, and the reservation was of iron ore only: *Held,* not to vary the rule when the iron ore was the only ore known in that region, and the reservation originally made for the benefit of a furnace operator. *Shoenberger* v. *Lyon,* 88

See RESERVATION, 8, 9.

MISTAKE.

1. *Reformation of deed—Mistake must be proved beyond reasonable doubt.*—Where land was conveyed reserving ore, but it was asserted that the parties had agreed on a reservation of the ore for certain furnaces only, and that it had been otherwise written by mistake: *Held,* that a court of equity could relieve such a mistake, and reform the deed; but the fact not being admitted, an issue of fact was, in the discretion of the court, properly submitted to the jury, with an instruction that such mistake must be proved beyond a reasonable doubt. *Stockbridge Co.* v. *Hudson Co.,* 120

See RESERVATION, 18; STOCK, 36; WITNESS, 1.

NEGLIGENCE—See SURFACE, 3.

NOTICE.

1. *Where a party has actual knowledge of facts* such knowledge is equivalent to notice. *Maturin* v. *Tredinnick.* 15

2. *Notice of annual meeting, when required.*—The annual meeting of the stockholders of a corporation for the purpose of electing a board of trustees, as required by statute, can not, unless all the stockholders be actually present, and consenting in person or by proxy, be legally held until after notice of the time and place thereof given in some authentic and legal mode. *San Buenaventura Co.* v. *Vassault,* 550

3. *Idem—Time fixed in by-law.*—The fact that a by-law of the corpora-

NOTICE. *Continued.*

tion designates "the third Monday in April, at the office of the company, in San Francisco," as the time and place for the meeting, does not dispense with the notice, as no hour is named. *Id.*

See CORPORATION, 7; SUNDAY, 1; TRUST, 1; VENDOR AND PURCHASER, 1.

OIL—See REPLEVIN, 2.

ORE—See FURNACE, 1; MINERALS, 2.

PARTIES.

1. *Persons who have no real interest to be affected* by a decree, and against whom no decree is asked or can be made, are not necessary parties to a suit. *Van Bokkelen* v. *Cook*, 421

2. *Decree in absence of unnecessary party.*—An heir and distributee is a proper party in a suit to recover assets against the former administrator, but if the court is able to proceed to a decree, and do justice to the parties before it without injury to absent persons, it will do so. *Id.*

3. *Misnomer of immaterial party.*—In an action against the trustees of a corporation, in which the corporation is made a party defendant under the name Washington *Gold* Q. M. Co. instead of Washington Q. M. Co., if it appears that the corporation was a necessary party only upon a branch of the case wherein no relief was granted, the defendants are not prejudiced by the misnomer. *Parrott* v. *Byers*, 505

See CORPORATIONS, 7; PERSONAL LIABILITY, 7, 8; PLEADING AND PRACTICE, 6; STOCK, 32.

PARTNERSHIP—See STATUTE OF FRAUDS, 3.

PATENT.

1. *Patent relates back.*—A patent of the United States to a mining claim (upon a school section) relates back to the time of the original location, to the exclusion of all adverse intervening rights. *Heydenfeldt* v. *Daney M. Co.*, 204

2. *Patent construed by act of Congress—District rules, subordinate.*—As long as local laws are not in conflict with the laws of the United States, they must be observed; but the act of Congress can not be subordinated to the local laws, and it is in the light of the provisions of the act of Congress that every patent issued in pursuance thereof must be construed. *Wolfley* v. *Lebanon Co.*, 282

See ADVERSE CLAIM, 1; CONVEYANCE, 1; SCHOOL LANDS, 4, 7; SIDE LINES, 1.

PERSONAL LIABILITY.

1. *Limitation of liability.*—It is the policy of the Companies Act to allow the adventurers to limit the extent of their personal liability. *Baglan Hall Co., In re* 261

2. *Assertion of corporate solvency creates no personal liability.*—An officer and stockholder of a corporation who states to a creditor that the corporation is, in his opinion, solvent, does not thereby make himself liable to the creditor, if the statement was made in good faith, although the corporation was in fact at that time insolvent. *Searight* v. *Payne*, 401

PERSONAL LIABILITY. *Continued.*

3. *Pursuing stockholders when officers have property.*—A stockholder in a mining company can not defend himself from judgment in an action against himself, impleaded with his corporation, under Stat. 1851, C. 315, by showing that the officers of the corporation have sufficient property to pay the judgment. *Brayton* v. *New England Co.*, 458

4. *Liability of stockholder for assessments.*—A stockholder, who was not one of the original subscribers to a mining corporation organized under the general mining law, is liable, the same as an original subscriber, for any balance due upon assessments, after applying the proceeds of stock sold for default. *Merrimac M. Co.* v. *Bagley*, 471

5. *Personal liability not contingent.*—The liability of a stockholder of a mining corporation for his proportion of the company debts, as provided by statute, is not contingent on a recovery against the corporation, but the right of action against him accrues at the same time as that against the corporation. *Davidson* v. *Rankin*, 472

6. *Idem—Liability of executors—Bar.*—It follows that it was, in the case of a decedent, a debt due at the time of his decease, and that neglect for the period limiting the presentation of claims due at his decease, will forever bar action. *Id.*

7. *Parties in personal liability suits.*—Under the Manufacturing Company Act of July 18, 1863, a bill can not be filed against the corporation and the officers, to enforce the individual liability of the latter, but against the officers only. *Sheriff* v. *Globe Oil Co.*, 475

8. *The bill must be filed by the creditors* in behalf of themselves and all other creditors of the corporation. *Id.*

9. *No personal liability for assessments.*—The act of July, 1863, (for incorporating mining companies) does not make a transferee of stock personally liable to pay assessments. *Franks Oil Co.* v. *McCleary*, 477

10. *Personal liability statute not enforced extra-territorially.*—A Pennsylvania statute limited the amount of the lawful debts (not including capital stock) of certain companies to the amount of their capital actually paid in, and further provided that "if any debts or liabilities shall be contracted exceeding the said amount, the directors and officers contracting the same, or assenting thereto, shall be jointly and severally liable, in their individual capacities, for the whole amount of such excess, and the same may be recovered by action of debt as in other cases." In an action to recover for a violation of this statute, *held*, that the liability so created was in the nature of a penalty, and not enforcible outside of the State which enacted the law. *First Nat. Bk.* v. *Price*, 485

11. *Parol agreement to waive personal liability.*—A boiler, engine and appurtenances were purchased by an incorporated company, it being a part of the agreement that the purchase money should be secured by note and mortgage, and that the vendors should look only to the company and to the mortgage for the payment of the purchase money. The note and mortgage were duly delivered and accepted. In an action brought under the Personal Liability Act by the vendors against a stockholder of the company to recover on the note, *held*, that the plaintiffs were not entitled to recover; and that any collateral agreement or the independent fact of the release of personal liability might be proved, whether preliminary

PERSONAL LIABILITY. *Continued.*

nary to or contemporaneous with the written contract with the company. *Basshor* v. *Forbes*, 530

12. *Personal liability of trustee—Proof of acceptance of trust.*—The mere election of a trustee, under the general act for the formation of manufacturing and mining companies, does not render him liable for the debts of the corporation because of a failure to comply with the law; there must be evidence of an express or implied acceptance of the office. *Cameron* v. *Seaman*, 584

13. *Annual report—Filing of, after set period.*—Under the act requiring the company annually, within twenty days from the first of January, to make a report, which shall be signed, verified, filed and published, the filing and publishing may be done after the twenty days have elapsed. (FOLGER and RAPALLO, JJ., dissenting.) *Id.*

14. *Corporation to be first pursued.*—A creditor of a corporation can not proceed in the first instance against a stockholder upon his individual liability without first having shown that he has exhausted his remedy against the corporation. *Ladd* v. *Cartwright*, 607

15. *Equity is the only proper forum* for enforcing the personal liability of stockholders. *Id.*

16. *General statement of the facts and proof necessary to fix personal liability* upon a stockholder, with citation of the authorities by the court. *South Mt. Co., In re* 615

17. *Liability under Sec. 349 of California code.*—By section 349 of the Code of Civil Procedure of California, relating to the sale of delinquent stock, the stockholders are not personally liable for assessments unless from the terms of their subscription such liability was incurred. *Id.*

18. *Liability limited by statute.*—The remedy of the creditor against the stockholder personally is limited and defined by section 322 of the California code, and his liability can not be extended beyond the limits therein prescribed. *Id.*

19. *Enforcing stockholders' personal liability; analogy to garnishee proceedings.*—Under section 8 of the act of 1872, entitled "Corporations," making stockholders liable to creditors of the corporation to the extent of their unpaid stock, to be proceeded against at the same time, as in cases of garnishment, it is not essential that a stockholder or stockholders should be proceeded against at the same time the suit is brought against the corporation, as in garnishee proceedings under the Attachment Act. The intention of the act is to give the remedy as ample and complete as in cases of garnishment known to the laws of the State, including the process after judgment. *Coalfield Co.* v. *Peck*, 623

See CORPORATION, 2; STATUTE OF LIMITATION, 5; STOCK.

PERSONAL PROPERTY—See CLAIM, 1.

PLEADING AND PRACTICE.

1. *Practice on submitting issues to jury* in equity cases, stated. *Stockbridge Co.* v. *Hudson Co.*, 120

2. *Pleadings strictly construed against the pleader.*—Pleadings which are uncertain or ambiguous must be taken in a sense most unfavor-

PLEADING AND PRACTICE. *Continued.*

able to the pleader. Therefore, where a bill in equity, by the assignee of a bankrupt corporation, sought to charge shareholders in respect of their shares, and alleged that there were three classes of shares fraudulently issued, but did not specify to which class the defendants' shares belonged, they were entitled to assume that their shares were of the class least open to objection. *Foreman* v. *Bigelow*, 269

3. *Multifariousness.*—A bill which joins defendants, some of whom are liable to one plaintiff only, some of whom are liable to another, and some of whom are responsible, if at all, for independent violations of the statute, falls within the definition of multifariousness. *Sheriff* v. *Globe Oil Co.*, 475

4. *Immaterial error* will not justify reversal. *Wynkoop* v. *Seal*, 493

5. *Averment that defendants are trustees.*—An averment that the defendants are "*the* duly elected trustees of said company," is equivalent to an averment that they are the only trustees. *Parrott* v. *Byers*, 505

6. *A court can not without their consent decree the rights incidentally involved between co-defendants* in which plaintiff has no interest. *Pratt* v. *Taunton Copper Co.*, 590

See APPEAL; CHANGE OF VENUE; SPECIFIC PERFORMANCE, 20; STATUTE OF FRAUDS, 1; STATUTE OF LIMITATIONS, 7; SURFACE SUPPORT, 7; VARIANCE. 1.

POSSESSION.

1. *What is sufficient possession of mining claim.*—The possession of one claiming under a parol sale, or unrecorded bill of sale, in order to impart notice to a subsequent purchaser, need not be evidenced by an actual inclosure or anything equivalent thereto. *Patterson* v. *Keystone Co.*, 169

2. *The possession of a claim by a company* composed of several persons is the possession by each one of its members of his individual share. *Id.*, 171

See ADVERSE POSSESSION, 4, 5; REPLEVIN, 1; SEVERANCE, 11.

PROSPECTING CONTRACT.

1. *Implied promise of prospector to convey, without demand.*—Where a party located certain mining ground in his own name but under contract for another person: *Held*, that there was an implied promise to convey upon request and that such other person at once acquired a right to a specific performance which might be enforced in equity without a previous request. *Welland* v. *Huber*, 364

See RESERVATION, 17; SPECIFIC PERFORMANCE, 18.

PROSPECTUS.

1. *Failure to get the property intended.*—In its prospectus an oil company set forth a description of ten tracts of land it proposed to purchase, but only purchased eight. On action brought to recover the price paid for stock, based upon alleged fraud in the representations of the prospectus: *Held*, that it was error for the court to charge that if from the prospectus, the plaintiff had a right to believe the company would acquire the property, and that the company was organized with a view to

PROSPECTUS. *Continued.*

the ownership of those pieces of property, and it did not obtain them. the plaintiff would be entitled to recover; the facts being, that the company purchased other land which it believed of equal value for oil purposes in place of one of the parcels it failed to procure. and retained in its treasury $75,000 cash, the price of the remaining parcel, title to which could not be obtained. *Kelsey* v. *Northern Light Co.*, 498

See RESCISSION, 3.

RATIFICATION—See CORPORATION, 4; STOCK, 22.

REAL ESTATE.

1. *Mining claims are real estate within* the Practice Act defining the venue in civil actions. *Watts* v. *White*, 11

RELATION—See PATENT, 1.

REPLEVIN.

1. *Party having right of possession may maintain replevin.*—Replevin lies wherever one man claims goods in the possession of another, and this, whether the claimant has ever had possession or not, and whether his property in the goods be absolute or qualified, provided he has the right of possession. *Wilkinson* v. *Stewart*, 1.

2. *Replevin of mixed petroleum.*—It is no bar to an action of replevin for crude petroleum that plaintiffs' oil has been mixed with other like oil of defendants by the wrongful act of a third party, where the quality of the petroleum remains unchanged. What the effect upon the plaintiffs' right would be if the character of the oil were essentially changed, not decided. *Id.*

3. *Replevin lies for stone taken from bed of stream.*—By the principles of the common law in force in the State of Illinois, a river, though navigable in fact, is not so in law, if it is above the point where the tide ebbs and flows. In such a case the bed of the stream belongs to the riparian owners, each of whom owns to the middle or thread of the stream, and stone or gravel taken therefrom without the consent of the adjoining proprietor. may be replevied by him. *Braxon* v. *Bressler*, 163

RES ADJUDICATA.

1. *Further damages from original act, after one satisfaction.*—The withdrawal (by mining coal under an adjoining close) of any part of the stratum to the support of which the owner of the adjacent soil or house thereon is entitled, is a cause of action as an injury to the right, although no immediate damage ensues; and no fresh cause of action accrues by the occurrence of subsequent damage; therefore, to an action for damage caused by such withdrawal, it is a good answer that a prior action has been brought for damage consequent upon the wrongful act, on an accord and satisfaction agreed to and performed between the parties. *Nicklin* v. *Williams*, 650

RESCISSION.

1. *Rescission after report of expert—Saltpetre cave—Statement of material facts defined.*—Perkins sold to Rice a saltpetre cave, telling him that the nitrous earth in the cave would yield from three quarters to two

RESCISSION. *Continued.*

pounds of saltpetre to the bushel of dirt, whereas, in fact, the cave had become greatly exhausted and was not capable of producing "anything nigh the quantity" of saltpetre represented. At the same time he informed him that he, the vendor, was not a judge of saltpetre caves, and advised him to not trust to his representations, but to get a competent person and have the cave examined, which plaintiff Rice accordingly did, and after such examination and report became the purchaser. *Held*, that notwithstanding such inspection, it by no means followed that the false statements of defendant had no effect in inducing the purchase. 2. That the assertions of defendant were of specific facts, distinguishing the case from those instances where the vendor had merely overstated the value of the premises, and amounted to a misrepresentation of that character which would authorize rescission. *Perkins* v. *Rice*, 8

2. *Rescission after sale of stock.*—A plaintiff seeking to set aside as fraudulent a sale of mining shares made to him by the defendant, can not have a rescission after he has sold such shares; but the sale of certain shares does not deprive him of the right of rescission as to others not sold, where the property is all of one sort. *Maturin* v. *Tredinnick*, 15

3. *Departure from prospectus by purchasing other mine—Rightful caution distinguished from laches.*—Smith received a prospectus issued by the defendant, stating that they had agreed to purchase certain silver property in Nevada, and on the faith of it took shares on the second of August, 1865. On December 30th, he received word that this property had been found worthless by the party sent out to examine it, but that the company had determined to purchase other mining property instead, accompanied by the statement from the directors that they would shortly issue a detailed report, which report he received on January 19, 1866. The original prospectus had been issued in good faith, the directors believing the first mentioned mine to be valuable. On February 6, 1866, he filed a bill to be relieved from his shares. On May 28th, a winding up order was made, whereupon he applied to have his name removed from the list of contributories. *Held*, that he was not guilty of *laches*, as he had a right to wait for detailed information concerning the change in the projects of the company. 2. That he was entitled to have his name removed from the list of contributories, although since the filing of the bill the order for winding up had been made. *Reese River M. Co., In re* 19

4. *Rescission of contract for mining stock—Offer to return stock before suit.*—A party seeking to rescind a contract for mining stock on the ground of fraud, is not bound to take the certificate of stock from the bank with which it has been deposited for him, and tender it back to the vendor before bringing suit. *Pence* v. *Langdon*, 32

5. *Instructions on rescission issue.*—For instructions relating to a fraudulent sale of mining stock, and a rescission thereof, as approved on review, see opinion. *Id.*

6. *Delay in offering to rescind.*—A party having sold certain lands for shares of mining stock, and afterward attempting to rescind on the ground of fraud in the representations concerning the value of the stock, should offer to rescind promptly upon discovering the facts; but a delay of a little

RESCISSION. *Continued.*

less than six months in making the offer is not such *laches* as to deprive the party of his right to relief. *Marston* v. *Simpson*, 36

7. *Rescission after entry.*—A vendee, by his entry and acting as a partner in an iron concern, does not waive the benefit of a contract for good title, and may rescind upon failure to receive such title. *Stevens* v. *Guppy*, 315

8. *Rescission of contract for mining lease on account of lessor's delay.*—A. on the 4th of October, contracted to grant a mining lease to B, but no time was mentioned for completion. On the 10th of December, B gave notice to A that unless he completed the contract within a month he would rescind the contract: *Held*, on A's default, that B was justified in giving the notice, that the time was reasonable, and a bill by A for specific performance was dismissed with costs, although there were matters essential for the completion which did not depend on A, but on third parties. *Macbryde* v. *Weeks*, 346

9. *Restoration before rescission—Tender not needed where offset exists.*—The bill charged that plaintiff and defendant were engaged as partners in the purchase of mining claims; that defendant was the active partner: that by false representations he induced plaintiff to sell to him his interest at a greatly reduced price, and prayed a cancellation of the deed, an account, etc. Defendant demurred because there was no tender of the sum received on the sale sought to be set aside: *Held*, that as the bill also charged that profits belonging to the partnership were in the hands of defendant to an amount exceeding the sum paid to plaintiff for the claims, the bill in effect offered to restore the defendant to the condition in which he was before the contract was made. *Watts* v. *White*, 11

See SUNDAY, 1.

RESERVATION.

1. *Reservation equivalent to grant.*—A reserve of minerals is construed as an actual grant thereof. *Marvin* v. *Brewster Co.*, 40

2. *Right of mine owner to penetrate surface.*—The reservation in a deed of land of the minerals which may be found therein, implies the right to penetrate the surface for minerals, and to use such means in mining and removing the minerals as are necessary to a profitable working of the property; but the means used must be necessary, as distinguished from convenient. *Id.*

3. *The miner in his surface user may keep pace with the progress of invention* so far as is necessary for profitable working in competition with rivals. *Id.*

4. *Subsequent deeds ignoring reservation.*—The fact that deeds to subsequent grantees of the surface do not contain the reservations of the right to minerals contained in prior grants, does not affect the right of the mine owner to the minerals, or the mode of procuring them. *Id.*

5. *Reservation unaffected by non-user—Purchaser compensated against ancient exception of minerals.*—In an action tried in 1810 to enforce the specific performance of a contract to purchase estates, the defendant claimed compensation for a defect in the title because of a reservation of salt works, mines, etc., with a right of entry, contained in

RESERVATION. *Continued.*

a grant of the premises in 1704. It appeared that the right had never been exercised and that the title had been transferred in 1761 without such reservation. *Held*, that the reservation was good, and the defendant entitled to compensation. *Seaman* v. *Vawdrey*, 62

6. *Extent of reservation—Exception out of exception.*—Vendor conveyed certain closes with buildings thereon *excepting* all mines and coal, with liberty to himself to enter and sink pits for getting all such coal, and to erect engines, etc., *excepting* as to such lands as lie within 150 yards of the messuage and buildings, and except any homestead: *Held*, that the exception reserved to the vendor the right to dig coal under the messuage, buildings and homestead, and within 150 yards of the same, respectively, but that he was not entitled to sink pits, erect engines, etc., within 150 yards of the messuage or buildings or within the homestead. *Bowler* v. *Wolley*, 65

7. *Reservation of "all the free stones" confined to stone on surface.*—The grantor in a deed reserved all the *free stones* on the land, with the privilege of carrying off said stones. The question being whether this extended to the stone of a ledge under ground, it was *held* that parol evidence was admissible to show the situation of the property at the date of the deed; that there were 30 to 100 tons of free stones then lying on the land, disconnected from any fixed ledge, and that this ledge was not then known; and this being proved, it was *held* that the reservation did not embrace the stone in the ledge. *Putnam* v. *Smith*, 68

8. *Reservation of "mineral or magnesia of any kind."*—B., by deed, conveyed to F. a tract of land in fee simple "excepting and reserving for himself, his heirs, executors, administrators and assigns, all mineral or magnesia of any kind, and to convey the same away through the premises intended to be sold, so as to do as little damage to the owner as possible, with all bricks and blocks of soapstone, as I, the said 'B.,' may want for my own use." *Held*, that this was such a reservation as entitled the grantor to chromate of iron, afterward found. *Gibson* v. *Tyson*, 72

9. *The effect of the adjective "all"* in connection with minerals, considered. *Id.*

10. *Reservation of moiety of ore where the other moiety was outstanding in another.*—B., seized in fee of a tract of land, subject to an outstanding title to one half of all iron ore found on the premises, conveyed the same to H. in fee, "excepting and reserving to the said B., his heirs and assigns, the one half of all iron ore found on the premises." *Held*, to be a reservation to the grantor himself of that half of the ore which was vested in him, and not a mere notice of the reservation of the other half which was outstanding. *Baker* v. *McDowell*, 84

11. *Reservation, large as the grant.*—A reservation in a deed of conveyance, which is as large as the grant itself, is void, and the grant will stand unaffected thereby. *Shoenberger* v. *Lyon*, 88

12. *Application of the rule to the facts.*—S. and L. being tenants in common of Huntingdon Furnace, and of lands appurtenant thereto, and also of the mineral rights in a certain tract of land, L. conveyed to S. all his interest in the premises excepting and reserving "the full undivided half part of all the iron ore which may, at any time, be found on any of

RESERVATION. *Continued.*

the land now belonging to Huntingdon Furnace," etc.: *Held*, that this reservation could not be held to apply to that tract in which the only interest owned was the ores, as the reserving clause would take back as much as the granting clause had given. *Id.*

13. *Form of reservation of ores* set forth at length in statement of the case. *Id.*

14. *Reservation of right to quarry granite, assignable.*—A clause in a deed as follows, "reserving to myself the privilege of entering said tract, and taking and carrying away stone from" a certain portion of the tract containing a granite ledge, construed, not a reservation of a mere personal privilege, but of a right and interest in the use of the land, which the grantor might assign. *Munn* v. *Stone*, 102

15. *General reservation—Life estate.*—A reservation to the grantor generally, without words of enlargement or limitation, is a reservation for the period of the grantor's natural life. *Id.*

16. *Construction.*—A condition, upon the performance of which a reservation depends, must be strictly performed by the grantor, and within the time limited. *House* v. *Palmer*, 104

17. *Reservation of right to test for gold.*—The vendor of land retaining the right to test it for gold within eighteen months, with the right to work it if found, must not only make the test within the time limited, but must also give notice to the grantee of his election to preserve the reservation. *Id.*

18. *Deed reserving all ore to third party owning but four fifths.*—A person seized of the title to the undivided two thirds of a tract of land, and one fifth of the stone and coal on the tract, the right to the other four fifths of the coal being in the heirs of S. P., sold his interest by deed, "excepting and forever reserving the liberty and privilege for the heirs and representatives of S. P. deceased, to dig, take and haul away *all* the stone coal that is or may hereafter be found on the above described tract of land." It was *held*, that no part of the stone coal passed to the grantees under the said deed. *Benson* v. *Miners' Bank*, 107

19. *The right to minerals reserved carries with it the right to enter*, dig and carry them away, and all other incidents necessary to getting them. *Cowan* v. *Hardeman*, 113

20. *Reservation distinguished from exception.*—A deed reserving to the grantor "the right of mining on the above granted premises for the use of said company" an amount of ore not exceeding 7,500 tons annually at a rate of 37½ cents per ton, including all the facilities needful for doing the same, construed to contain a reservation as distinguished from an exception. *Stockbridge Co.* v. *Hudson Co.*, 120

21. *Idem—Incidents of reservation—Grantee not excluded—Statute of Frauds.*—Such reservation saves to the grantor no title to the land, or to the ore before it is mined or separated from the land; it does not restrict the grantee from mining at the same time, even to the exhaustion of the ore, and is not within the Statute of Frauds. *Id.*

22. *Assignment of reserration.*—A right reserved in a deed to mine ore is assignable by the corporation making the deed, and such right is not subject to limitation or suspension by extrinsic evidence that the

RESERVATION. *Continued.*

corporation was chartered to manufacture iron only in certain furnaces, and work mines only for its own use, and that at the time of the deed it expected to discontinue business. *Id.*

23. *Reservation of ore for supply of one furnace not limited to capacity of furnace then in use.*—In 1786 Peter Grubb conveyed to Robert Coleman, Sr., an undivided one sixth part of the Cornwall ore banks. The deed contained the following reservation: "Saving and reserving unto the said Peter Grubb, the grantor, his heirs and assigns forever, the right, liberty and privilege at all times hereafter, of entering upon the premises hereby granted and released, with his and their horses, carts, carriages and servants, and of digging, raising and hauling away a sufficient quantity of iron ore for the supply of any one furnace at the election of the said Peter Grubb, his heirs or assigns, at all times hereafter." It was claimed that under this reservation the grantor, or his assigns, were only entitled to a sufficient quantity of ore to supply a furnace such as was known in Pennsylvania at the time the deed was executed, and a bill was filed for an account of the ore taken in excess of that quantity: *Held*, that a court of equity had jurisdiction of the bill and could grant relief. *He'd, further*, that this reservation carried with it the right to enough ore to supply a furnace with all the modern improvements to be selected by the grantor or his assignees, and that the right to select was not exhausted by its exercise in a single instance. *Alden's Appeal*, 139

24. *Idem—The measure of the quantity of the ore* was so much ore and no more, as a given furnace would use in the course of a year, taking into consideration the wear and tear, and the necessity of its going out of blast for repairs at stated intervals. *Id.*

25. *Reservation limited by annual periods.*—Where parties entitled to take ore to the capacity of the furnace, neglected during any year to run the furnace, they are not entitled, in succeeding years, to take the ore which they omitted during the period when the furnace was idle. *Id.*

See SEVERANCE; SPECIFIC PERFORMANCE, 1.

RIPARIAN RIGHTS.

1. *Right of mining claim to bed of stream.*—The prior locator of a mining claim, on the bank of a stream, has the right to the use of the bed of the stream for the purpose of working his claim; and any subsequent erection, dam or embankment, which will turn the water back upon such claim, or hinder it from being worked with flumes, or other necessary appliances, is an encroachment upon the rights of such party, and entitles him to the recovery of damages. *Sims* v. *Smith*, 161

2. *Easement for navigation gives no right to remove the soil.*—The easement or right of using a navigable river as a highway does not give the right to quarry rock or remove the gravel or soil, except so far as necessary for the enjoyment of such easement. *Bra'on* v. *Bressler*, 163

3. *Grants bordering on rivers.*—Grants of land bounded on rivers, or upon their margins, above tide water, carry the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the edge of the river. *Id.*

See REPLEVIN, 3.

SALE.

1. *Sale of claim by parol.*—A *bona fide* parol sale of a mining claim, accompanied by a delivery of possession, is valid as against a subsequent sale of the same grantor, made by deed in writing, duly acknowledged. *Patterson* v. *Keystone Co.*, 159

2. *Verbal sale of copper lode prior to 1863.*—Prior to the act of April 13, 1860, title to a mining claim would pass by a verbal sale if accompanied by an actual transfer of the possession. This statute applied in terms only to gold mines until, by amendment of 1863, it was extended to mines generally. A verbal sale, therefore, of a copper vein, prior to 1863, would pass title. *Id.*, 171

3. *Verbal sale proved under averment of sale in writing.*—In an action to recover an interest in a lode the defendant answered claiming title by virtue of a sale in writing: *Held*, that the defendant was not by this allegation precluded from proving a verbal sale, the allegation being an averment of evidence not going to make a material issue. *Id.*

4. *No delivery and no price fixed, no sale.*—In an action for the price of a boat laden with coal, it appeared that there had been no actual delivery or possession taken by the alleged vendee and there was no specification of price *Held*, that there was no sale. *Bigley* v. *Risher*, 176

5. *Sale defined.*—Sale means a contract to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought. *Id.*

6. *Parol sale of mining claim.*—The right to a mining claim upon the public lands rests upon possession only, and a sale by parol by one in possession accompanied by a transfer of possession, transfers the title. *Gatewood* v. *McLaughlin*, 387

SALINES.

1. *Not waste to dig new wells.*—Tenant for life may dig a new salt well communicating with the same fountain, without restraint. *Findlay* v. *Smith*, 182

See WASTE, 1.

SCHOOL LANDS.

1. *At what time title rests in the State.*—Under the act of March 3, 1853, the State of California became the absolute owner of sections sixteen and thirty-six, both as to quantity and position, as fast as they were surveyed and sectionized, and her title did not depend upon the acceptance of selections by the officers of the United States. *Higgins* v. *Houghton*, 195.

2. *Power of State to sell mineral lands.*—The State of California, as owner of sections sixteen and thirty-six, may sell and issue patents for them regardless of the fact that they contain precious metals, or may by her laws prohibit the sale of such lands. *Id.*

3. *Certificates of purchase of school lands.*—Persons who hold certificates of purchase from the State for the sixteenth or thirty-sixth sections, or portions thereof, hold the land as the State held it before the certificate was issued, subject to the right of miners to enter upon and work it for mining purposes. *Id.*

4. *Patents for school lands.*—Query: Does the patentee of the State,

SCHOOL LANDS. *Continued.*

for any part of the sixteenth or thirty-sixth sections, hold the same subject to the right of miners to enter upon and work the same for mining purposes. *Id.*

5. *At the time of the passage of the Nevada enabling act* (1864), sections 16 and 36 (school sections) had not been surveyed, nor had Congress then authorized any disposition of the public domain within her limits. *Heydenfeldt* v. *Daney Co.*, 204

6. *Title passes not till survey—Compensation.*—In the grant of school sections, under the Nevada enabling act it was not intended to pass title until the lands were surveyed. The settler on such lands before survey was to be protected, and any loss to the State was intended to be compensated by other lands. *Id.*

7. *Mining patent on school land.*—The holder of a patent from the United States for a mining claim, located upon a school section, holds title as against the patent of the State, prior in date to the United States patent, but later than the date of the mining location. *Id.*

8. *Where a prior settler upon a school section waives his right* of pre-emption, the land vests, upon survey, in the State. *Natoma Co.* v. *Bugbey*, 211. Qualified, *Ivanhoe Co.* v. *Keystone Co.*, 223

9. *Idem—Rights of third parties.*—Where a settler upon school sections prior to their survey has waived his right of purchase from the United States and taken title from the State, a third party can not contest his title on the ground that the land was settled at the time of survey. *Id.*

10. *Mineral lands excluded in grant of school lands.*—The act of March 3, 1853, which granted to the State of California the 16th and 36th sections of public land for school purposes, did not cover mineral lands, they being by the settled policy of the general government, excluded from the grant. *Ivanhoe M. Co.* v. *Keystone M. Co.*, 214

11. *Strict pre-emption settlement not required.*—By the provisions of section 7 of the act of March 3, 1853, whenever, at the date of the survey of sections 16 and 36 of the public lands granted by said act to the State of California for school purposes, a settlement had been made thereon by the erection of a dwelling house, or by cultivation, and a title asserted by virtue of such settlement to a portion thereof, such title is valid, although the acts done are not the same as required to secure a pre-emption right under the act of Sept. 4, 1841. *Id.*

12. *Idem—Right of selection in lieu.*—The title in such a case where the settler's right has intervened does not vest in the State, but she has the right to select other land in lieu thereof. *Id.*

See DITCH, 1; MINERAL LANDS, 1.

SEVERANCE.

1. *Relation between mine and surface—What the mine owner may do.*—In an action by the surface owner against the mine owner to restrain certain mining operations, and to recover damages for alleged injuries to the surface: *Held*, that defendant's right to maintain a certain tramway, to erect on the surface and use a barn, powder house and blacksmith shop, to sink a shaft or drive a horizontal way, to erect and use an engine below the surface, to blast in the mine in the night time, or at any time, so as

SEVERANCE. *Continued.*

to shake or injure the plaintiff's dwelling and disturb his enjoyment, to deposit ore or refuse on the surface, was to be tested by the necessity therefor, as incidental to the right to mine and remove. *Martin* v. *Brewster Co.*, 40

2. *Power of Crown to grant license to mine.*—Whether under a mere reservation of Royal mines without a right of entry, the Crown can grant a license to enter on the land for the purpose of working them, *quære*. *Seaman* v. *Vawdrey*, 62

3. *Construction of the Texas statute reserving minerals to the republic.*—A patent was issued for a tract of land under act of June 3, 1837, of the Republic of Texas, having a *proviso* "that no lands granted by this government shall be located on salt springs, gold or silver mines, copper or lead, or other minerals." The tract patented contained a valuable saline: *Held*, that the act must be construed by its object rather than its letter. That the object was to reserve the salt springs and mines, but not to prohibit the survey and patenting of lands until their mineral character was ascertained. That the patent was valid, but did not operate to pass title to the saline. That by the act the mineral estate was severed from the surface and the right to enter and get the minerals remained with the reservation. *Cowan* v. *Hardeman*, 113

4. *Grant by co-tenant with reservation of ore, void.*—In a conveyance by one tenant in common, of his estate in the land held in common, a reservation of his interest in the mines in and upon the land granted is void. *Adam* v. *Briggs Iron Co.*, 225

5. *Presumption of severance from adverse user.*—In trover for copper ore raised under the plaintiff's land, *held*, that the presumption that the minerals followed the fee in the land might be rebutted by the absence of enjoyment of the minerals by the plaintiff and their user by persons not the owners of the soil. *Rowe* v. *Grenfel*, 234

6. *A severance of the mineral* and surface estates is consistent with the nature of land and qualifies the maxim *cujus est solum ejus est ad coelum*. *Stewart* v. *Chadwick*, 236

7. *Extrinsic evidence as to severance.*—In the construction of a contract inferring the severance of the surface and subsoil rights, extrinsic evidence is admissible to show the use to which the land is or may be applied. *Id.*

8. *Severance of mineral held in trust.*—Where W. and C. each claimed a "claim" right in mineral land, and C. and the administrator of W. entered into an agreement by which the said C. agreed to give to the said W.'s estate one sixth part of all mineral raised upon the land; that he would enter the land from the United States, and was to receive the surface or soil, of said property; that if he worked the ground, he would pay to said estate one sixth of the mineral; and that if the estate worked or discovered any mineral, it was to have the privilege to do so, without paying any part to any person: *Held*, 1. That C. was to hold the soil, or surface—the agricultural use of the land—and that the estate or heirs of W. held the mineral right; 2. That C., when he caused the land to be entered, held the mineral right in trust for the heirs of W. *Id.*

9. *Power not authorizing severance.*—An absolute power of sale or

SEVERANCE. *Continued.*

exchange of "all or any part" of lands does not authorize a severance of the minerals by the trustees: *i. e.*, it does not authorize a sale with a reservation of the minerals. *Buckley* v. *Howell*, 245

10. *Grant of right to dig coal.*—A conveyance of "the full right, title and privilege of digging and taking away coal to any extent (the grantee) may think proper * * * under the land of the" grantor, effects a severance of the right to the surface from the right to the underlying coal, and makes them distinct corporeal hereditaments. *Armstrong* v. *Caldwell*, 252

11. *No presumption of possession after severance.*—The presumption that the party having the possession of the surface has the possession of the subsoil also, does not exist when these rights are severed. *Id.*

12. *Non-user.*—In such case the owner of the minerals does not lose his right or his possession by any length of non-user. He must be disseized to lose his right, and there can be no disseizin by act that does not take the minerals out of his possession. *Id.*

13. *Surface support after severance.*—By partition, the surface was severed from the underlying coal, and the parts were allotted to different heirs, without any limitation as to the removal of coal: *Held*, that the owner of the coal could not remove it without leaving sufficient support for the surface. *Jones* v. *Wagner*, 690

See ADVERSE POSSESSION; SURFACE.

SHARE; SHAREHOLDER.

1. *Liability for company debts after transfer of scrip.*—The defendants had purchased the scrip of a mining company originated in fraud, and had attended the meetings of the company; but they never signed the partnership deed, were innocent of the fraud and transferred their scrip before the plaintiff commenced an action for goods furnished to the company after defendants had purchased their scrip: *Held*, they were liable. *Ellis* v. *Schmoeck*, 259

2. *Shares of members owning the mine treated as paid up.*—Nine persons bought a moiety of a colliery from P. for £10,000, and the ten, after working it for some time, agreed to form a company for carrying it on, and a company was accordingly registered, the memorandum of association of which was subscribed by the owners of the colliery for numbers of shares proportioned to their respective interests, the nominal amount of shares subscribed for being £20,000. The memorandum stated nothing as to the shares being treated as paid-up shares, but the articles provided that all the shares subscribed for in the memorandum should be treated as fully paid up. The colliery was made over to the company, but no other payment was made by any of the subscribers of the memorandum. No other shares than those subscribed for by the memorandum were ever allotted: *Held* (reversing the decision of MALINS, V. C.), that the subscribers to the memorandum of association were not liable as contributories, for that the shares must be taken as having been fully paid up by handing over the colliery. *Baglan Hall Colliery Co., In re* 161

3. *Paid-up shares.*—Review of the English decisions as what shares are paid up. *Id.*

SHARE; SHAREHOLDER. *Continued.*

4. *The test to determine whether paid-up shares (so called)* are in fact such, is: could the company have set aside the transaction by which it has so treated them? *Id.*

5. *Fraudulent issue of shares as fully paid-up—Liability of shareholders.*—Certain shares in a mining company were issued as fully paid-up shares, in exchange for mineral lands. The lands were worth far less than the nominal value of the shares, and the transaction was clearly fraudulent, but it was formal and regular upon its face; the books of the company showed that the shares were fully paid for, and there was nothing to apprise an innocent purchaser that such was not the fact, and nothing to put him on inquiry. Some of these shares were innocently purchased by the defendants in open market. The company becoming bankrupt, its assignee filed a bill in equity against the defendants, setting out these facts, and praying for an account of the extent to which their shares of stock had been paid for, and the manner of payment. It was held that the bill must be dismissed. Innocent purchasers of shares are not liable in such a case, but the remedy of the corporation is against the guilty perpetrators of the fraud in their individual capacity. *Foreman* v. *Bigelow*, 269

See STOCK.

SIDE LINES.

1. *Lateral boundaries limit right of possession.*—A lode claim is to be fixed by reference to the plat or survey of the location, and although the lode in its descending course may be followed to any depth into the premises adjoining, yet in its onward course or strike it may not depart from the line of its location, and the patentee is not entitled to its possession beyond the lateral boundaries, as against one who has subsequently located and patented it. If the patent is broader than the law, it is to that extent nugatory. *Wolfley* v. *Lebanon Co.*, 282

SIDE VEINS—See LODE, 1.

SPECIFIC PERFORMANCE.

1. *In specific performance the vendee may elect to take compensation for an outstanding reservation,* instead of using it as a defense. *Seaman* v. *Vawdrey*, 62

2. *The discovery of a valuable mine between the time of contract and the time for delivery of deed,* whereby the land is shown to be worth a great price, instead of the small price paid for it, does not affect the transaction so as to make a court of equity treat it as an inadequate price and on that ground refuse specific performance. *Bean* v. *Valle*, 292

3. *Covenant to restore gravel pits.*—A court of equity will not decree specific performance of a covenant by the lessor to fill up gravel pits upon the premises intended in the demise, the legal remedy for breach of the covenant being ample. *Flint* v. *Brandon*, 308

4. *The principle upon which specific performance is decreed* is that the legal remedy is inadequate or defective. *Id.*

5. *Delay—Inadequate consideration and concealment of knowledge of salt spring—Defense to special performance.*—Where a vendee, as the

SPECIFIC PERFORMANCE. *Continued.*

defendant alleged, having discovered a valuable salt spring on the land, concealed his knowledge of the same from the vendor, pretending that the purchase was made for the wood on the tract, the price agreed upon proving wholly inadequate when the existence of the spring came to be considered, the vendee further being in default by delay in tender of installments, it was *held:* That the plaintiff should have no decree for a specific performance, although his knowledge and concealment of the salt springs was not conclusively shown, as the delay and inadequacy of consideration of themselves would be sufficient to defeat relief of that kind. *Bowman* v. *Irons*, 312

6. *Defective title excuses vendee of land.*—A vendee of an interest in ironworks, entering and acting as a partner, although charged with gross mismanagement and destroying the value of the property, can not be decreed to accept specific performance and to take a defective title and will not be presumed to have accepted such title; nor can an account of damages be taken and decree for compensation made upon bill framed only for specific performance. *Stevens* v. *Guppy*, 315

7. *Agreement to work in a particular manner.*—The remedy in an ordinary case of an agreement to work a quarry in a particular manner, is at law specific performance refused. *Booth* v. *Pollard*, 322

8. *Specific performance, when decreed.*—Specific performance of a contract is not a matter of right in the parties, but depends upon the sound and reasonable discretion of the court; is granted or withheld according to the circumstances of the case; and the court must be satisfied that the contract sought to be enforced is fair, just and reasonable, equal in all its parts, and founded on an adequate consideration. *Geiger* v. *Green*, 324

9. *Specific performance of a privilege to mine not enforced.*—O. granted to R. "the privilege of digging and moving the ore on that part of my place joining W. and P.'s, at twenty-five cents per ton, for the privilege of ground; leave also to build a house on said land, etc., the materials to be got on my land, at R.'s expense." This confers the mere privilege of digging ore; is not compulsory; imposes no corresponding obligations on R., who might refuse to work the mine, and O. could not oblige him to work it. It contains no mutual or reciprocal engagements, and can not be specifically enforced in equity; consequently there was no ground for granting or continuing an injunction upon its stipulations. *Id.*

10. *Indefinite contract—Decree for lease of moiety of a colliery against a single co-tenant, refused.*—One of two tenants in common of lands containing mines, entered into a negotiation for a lease of minerals, and wrote a letter, stating his willingness to grant a lease on the terms of a paper referred to in the letter. There were two papers, each of which in some respect answered the description in the letter. One of these purported to be terms for letting and taking coals, "etc.," under the lands in question, but contained no more definite description of the minerals, which were the subject of it. In a suit by the proposed lessee for specific performance as to the moiety belonging to the tenant in common, who had written the letter, *held*, 1. That the paper to which the

SPECIFIC PERFORMANCE. *Continued.*

letter referred was not sufficiently identified. 2. That even if it was shown to be the above paper, its terms were too indefinite to be enforced specifically. 3. That the contract being for a lease of the entirety, and the defendant not having been shown to have made any misrepresentation as to his title or otherwise, it could not be enforced against him as to one moiety only. *Price* v. *Griffith*, 330

11. *Laches in enforcing coal contract—Construction.*—Bill by an iron manufacturing company, against proprietors of coal mines adjoining their works, for specific performance of an agreement to sell to the company, at a fixed price per ton, all of certain beds of coal, estimated to contain from 120,000 to 150,000 tons, to be raised and delivered by defendants at the rate of 500 tons per week, and the company to drain the beds; and for injunction to restrain defendants from selling any part to other persons. The bill averred that the coal was very conveniently situated with reference to the company's iron works, which adjoined thereto, and that the company had the power, by means of their engines and pits, to drain the beds, and had occasion for a large quantity of coal of that particular description. Demurrer allowed. 1. Because not practicable for the court to supervise such a contract. 2. On account of *laches* in delay of eleven months after performance refused, the contract having reference to a commodity of fluctuating value as to which unusual vigilance is expected from parties seeking specific performance. *Pollard* v. *Clayton*, 334

12. *Supervision of working by court—Special value of particular coal mine to particular iron works.*—Leave to amend and to account for the *laches* refused on the ground that a court of equity could not interfere to see to the execution of a contract of that character, due in installments and requiring peculiar supervision, and the benefit to be derived from the particular location of the beds relative to the iron works, not being, of itself, sufficient ground for specific performance. *Id.*

13. *Vendor must furnish abstract of title.*—A agreed to grant a lease to B. After considerable delay on the part of A, B gave A notice that unless he completed within a month, he would rescind the contract. The day before the expiration of the time thus limited, A forwarded to B the drafts, but he furnished no abstract nor showed that he was in a situation to complete. B rescinded the contract: *Held*, that it was effectual, and the court dismissed A's bill for specific performance with costs. *Macbryde* v. *Weeks*, 346

14. *Seeking benefit of discovery made by others.*—In a contract to lease a mine for twelve months in order to encourage search for minerals, the lessor was to make good title to the lessees for one half the minerals discovered. The lessees laid by and allowed other parties claiming a right so to do to prospect for and discover "a valuable and rich copper mine" which added greatly to the value of the property, and further it did not appear that such lessees were able or ready to do the necessary work, although in their bill for specific performance they alleged that such discovery had been made "at the very point at which they intended to commence work." *Held*, that they were not entitled to specific performance. *Cabe* v. *Dixon*, 357

15. *Specific performance of contract for stock.*—The general rule

SPECIFIC PERFORMANCE. *Continued.*

that a court of equity would not enforce a specific performance of an agreement for the transfer of stock, applied particularly to public stocks, such as are commonly bought and sold in the market, and where exact compensation in damages could be awarded by a court of law. *Treasurer* v. *Commercial M. Co.*, 360

16. *Idem—Where the stock has no certain value.*—Where stock is of a peculiar and uncertain value, and where compensation in damages will not afford a party a full and adequate remedy, a court of equity will decree a specific performance. *Id.*

17. *Exception to general rule in case of mining stocks.*—In this State courts of equity will decree a specific performance of contracts for the transfer of mining stocks, owing to their fluctuating and uncertain value in market, and the difficulty of substantiating by competent evidence what would be a proper measure of damages. *Id.*

18. *Prospector locating greater claim than he allows to his outfitters, held to specific performance.*—Welland, Gross and Koch, in 1871, entered into a verbal prospecting contract with Huber, the defendant. They became his outfitters and he agreed to prospect for deposits, one equal fourth to belong to each party. While bound by this agreement he discovered the Huber ledge, on which he located 400 feet in his own name and 200 feet in the name of each of his three associates: *Held*, that the plaintiffs (Welland and Gross) were entitled to specific performance by conveyance from Huber of their interest in the 400 feet located in the sole name of the discoverer. *Welland* v. *Huber*, 363

19. *Conveyance out of and admission by plaintiffs.*—Plaintiffs had sold their interest in the specific feet located in their names to defendant, their associate, and had admitted that they had sold out their interest in the mine: *Held*, (but specifically upon the pleadings) that these facts were no bar to the decree prayed for. *Id.*

20. *Defense to be confined to issue raised by pleadings.*—In a suit to compel the conveyance of certain mining ground, where defendant relied upon an answer that plaintiff was not the owner or entitled to conveyance: *Held*, that the defense must be confined to the matter set up in such answer. *Id.*

21. *Specific performance where subject-matter (coal) proves nonexistent.*—Defendants agreed to take a lease of the Shenkin coal vein, "being about two feet thick" with the underlying beds of fire-clay, at an annual fixed rent besides the royalties. On suit for specific performance brought to compel them to accept the lease, it was in evidence that on search the coal vein was found not to exist under the land described, although counter evidence left it uncertain whether the search had been sufficient: *Held*, that defendants under the agreement had a license to search for the vein, but not a warranty that it would be found, and accordingly plaintiff was entitled to specific performance, whether the Shenkin vein existed or not. *Jefferys* v. *Fairs*, 367

See COSTS, 1; DEMAND, 1; INJUNCTION, 1.

SPRINGS.

1. *Where a subterranean flow of water has become so well defined as to constitute a regular and constant stream, the owner of the land above,*

SPRINGS. *Continued.*

through which it flows, may not divert or destroy it to the injury of the person below, on whose land it issues in the form of a spring. *Wheatley* v. *Baugh*, 274

2. *But where the spring depends for its supply upon percolations* through the land of the owner above, and in the use of the land for mining or other lawful purposes the spring is destroyed, such owner is not liable for the damages thus done, unless the injury was occasioned by malice or negligence. *Id.*

3. *No servitude in favor of percolating waters.*—The prior use of a spring for the purposes of a tannery, confers no right of servitude over or through the land of the adjoining proprietor through whose land the water percolates. *Id.*

4. *Idem—No prescription.*—Nor would the enjoyment of the spring for twenty-one years raise any presumption of a grant; for no presumption would arise against the owner until it was shown that the exercise of the privilege interfered with his rights in some manner as to entitle him to legal redress. *Id.*

STATUTE OF FRAUDS.

1. *Statute of frauds, how pleaded.*—A plea of the Statute of Frauds should expressly aver that the contract concerning the land was not in writing, and should contain an answer to all the other facts not expressly denied by it. *Bean* v. *Valle*, 292

2. *Sale by transfer of receiver's receipt.*—Bean delivered his receiver's receipt for an eighty-acre tract, indorsed as below stated, to Keemle, telling him to sell the land to J. & V. Valle for one hundred dollars if he could get it. J. & V. Valle agreed to take the land, paid the sum stated, and Keemle delivered to them the receiver's receipt with the indorsement, "transferred to Valle, Janis & Valle," signed "J. S. Bean." The purchase money was paid to Bean who expressed himself well satisfied. The purchaser was put in possession, and in a short time developed valuable lead diggings: *Held*, that the contract was not within the Statute of Frauds, and specific performance was decreed. *Id.*

3. *Partnership agreement—Subleases.*—An agreement between A, a lessee of a mine, and B, to become partners in the mine, paying the reserved rent, subletting the mine at a royalty and dividing the profits: *Held*, to be within the Statute of Frauds, and not sufficiently proved by a receipt signed by A and given to B, for a sum as B's share of the head rent of the mine, the sum being exactly half of that rent. *Caldick* v. *Skidmore*, 383

4. *Assumption of the mine debts by the lessee.*—A debtor leased to others certain furnaces and ore banks at a stipulated rent, and sold them the personal property at the works, the vendees to assume and pay whatever debts of the vendor due to the workmen, and to farmers and others for provisions, the vendees might think proper, they to be allowed for the same. The vendees publicly assumed the said claims, and afterward, and before all such debts were paid, the plaintiffs, under a judgment for a balance of purchase money of real estate, had an attachment served upon the vendees, who were made garnishees: *Held*, that the vendees were

STATUTE OF FRAUDS. *Continued.*

bound by their agreement and assumption to pay such workmen and other creditors; and as their assumption was made before the service of the attachment, the money yet payable by them could not be attached by the plaintiffs to the prejudice of such creditors. *Vincent* v. *Watson*, 388

5. *The creditors of the lessor might severally maintain suit* against the lessees on their assumption to pay the claims of the former. *Id.*

6. *Release of lien, good consideration for promise of assumption.*—When a creditor agrees to assume the debt due to another creditor in consideration of such second creditor releasing his lien to the advantage of the security of the first creditor, such contract is not within the Statute of Frauds. *Carothers* v. *Connolly*, 394

7. *Void sale of sand.*—The plaintiff made an agreement with the defendant to let him take the sand out of a pit fifty feet wide, the entire length, for the sum of $350, and gave him one year's time to take it out; the agreement was signed by the plaintiff and not by the defendant: *Held*, that the agreement was for the sale of an interest in land, and not having been signed by the defendant, is, as to him, by force of the Statute of Frauds, void. *O'Donnell* ads. *Brehen*, 397

8. *Stock contract void under Statute of Frauds.*—A contract to sell and deliver at a future day mining stock (price $1,350) when no part of the stock is delivered, no part of the purchase money paid, and no note or memorandum of the sale or transaction made or signed by the parties, is void under the Statute of Frauds. *Mayer* v. *Child*. 399

9. *The assignment of a contract void under the Statute of Frauds* does not constitute a good consideration for a promise to pay. *Id.*

10. *Parol promise by stockholder to pay corporate debt.*—Where goods are sold and credit given to a corporation, an officer and stockholder can not be held personally liable for the debts thus created, upon a promise to pay or see them paid, unless such promise be in writing. *Searight* v. *Payne*, 401

See RESERVATION, 21.

STATUTE OF LIMITATIONS.

1. *It is too late for executors to set up the Statute of Limitations*, who made no suggestion thereof when made parties to a bill six years after the death of their testator, nor six years thereafter when they filed an amended bill. *Alden's Appeal*, 140

2. *The Statute of Limitations is applicable to all corporeal hereditaments*, including those that are only subsurface rights. *Armstrong* v. *Caldwell*, 252

3. *The adverse possession of the mine by the owners of the surface* for the statutory period, would give title; but it must be distinct from the possession of the surface. It is unaided by surface rights or occupancy. *Id.*

4. *The possession to give title must be actual* (as distinguished from constructive), exclusive, continued, peaceable and hostile. *Id.*

5. *Liability of stockholders.*—The limitation of two years in the Bankrupt Act, within which time the assignee must bring suit against any person "claiming an adverse interest touching any property or rights of

STATUTE OF LIMITATIONS. *Continued.*

property transferable to, or vested in, such assignee," applies to a suit in equity brought by the assignee of a bankrupt corporation to charge its shareholders on account of money due for the payment of their shares of stock. and the statute begins to run from the date of the assignment, and not from the date when the bankrupt court makes the assessment. *Foreman* v. *Bigelow*, 270

6. *Adverse possession by mining.*—If, during a part of the three years next after the recording of a tax deed, the former owner of the land, by himself, his agents or tenants, openly occupy it for mining purposes, the acts of mining not being merely occasional, fugitive and desultory, but as continuous as the nature of the business and customs of the country permit or require, this will be such an adverse possession as will interrupt the running of the Statute of Limitation in favor of the tax title claimant. *Stephenson* v. *Wilson*, 408

7. *Plea of the statute.*—Where a bill alleges a fraudulent transfer of stock by an administrator, and his final discharge, but alleges a want of knowledge of the fraud until "long after the discharge," it does not appear from the bill that the action is barred by the Statute of Limitations. *Van Bokkelen* v. *Cook*, 421

8. *Amending complaint can not affect the statute as to land not originally included.*—In an action for damages to farming lands, caused by debris from hydraulic mining, the plaintiff filed an amended complaint, counting on damages for injuries to lands not mentioned in the original complaint: *Held*, that the filing of the original complaint did not prevent the Statute of Limitations from running as to the trespass on the lands not therein mentioned. *Atkinson* v. *Amador Canal Co.*, 428

9. *Damages beyond statutory period.*—Where the damages allowable during years not barred by the Statute of Limitations have been assessed along with damages accruing during a period which was protected by the statute, so that the court can not segregate one from the other, the error necessitates a reversal of judgment. *Toombs* v. *Hornbuckle*, 430

10. *Statute of Limitations does not begin to run until injury occurs.*—The right of a person to the support of the land immediately around his house is not in the nature of an easement, but is the ordinary right of enjoyment of property; and till that is interfered with, he has no legal ground of complaint, although, in fact, something may have been done which (without his knowledge) has occasioned results that will afterward affect his property. *Backhouse* v. *Bonomi*, 677

11. *Idem—Recent injury from old undermining.*—A was the owner of certain houses standing on land which was surrounded by the lands of B, C and D. E was the owner of mines running underneath the lands of all these persons. He worked the mines in such a manner (without actual negligence) that the lands of B, C and D sank in: and after more than six years' interval their sinking occasioned an injury to the houses of A: *Held*, that a right of action accrued to A when this injury actually occurred, and that his right was not barred by the Statute of Limitations. *Id.*

See ADVERSE POSSESSION; APPEAL, 1; RESERVATION, 5.

STOCK.

1. *Risk of loss of personal remedy against stockholders.*—It is an ordinary risk to the buyers of stock that some of the shareholders may have the right to have their names removed as contributories. *Reese River M. Co., In re* 20

2. *Shares paid for in land at an over-valuation,* in the hands of an innocent buyer for value, are paid-up shares. *Foreman* v. *Bigelow,* 270

3. *Holders of shares issued improperly* (as for mines at an over-valuation) are to be distinguished from the holders of shares which the corporation had *no power to issue. Id.*

4. *The capital stock of a corporation is a trust fund* for the payment of its debts. *Id.*

5. *Administrator must account for foreign assets—Situs of mining stock.*—Shares of mining stock are assets in the hands of an administrator appointed in Nevada, the shares having come into his lawful possession, although the corporation exists by virtue of the laws of California, and he may be required to account for them in Nevada. *Van Bokkelen* v. *Cook,* 421

6. *In determining who are stockholders,* the court will not inquire beyond the legal title, except where there has been a fraudulent transfer. *Adderly* v. *Storm,* 435

7. *Collateral holder of stock liable for company debts.*—In 1837, one B., being indebted to the defendants, transferred to them certain stock in the Rossie Galena Company, delivering the certificates and assigning them upon the books of the company. By contemporaneous writing the defendants were authorized to dispose of the stock at a certain rate, and apply the proceeds in payment of B.'s debt as it became due, but if the debt was paid before the stock was disposed of, they were to return it. The debt was paid in September, 1838, whereupon the certificates were returned, indorsed with a power of attorney, for the re-transfer of the stock. This power being deficient, a more formal authority was afterward given, but the re-assignment was not made either upon the books of the company or otherwise until March, 1840: *Held,* that the defendants were stockholders, and liable for debts contracted by the company in January, 1840. *Id.*

8. *Idem—Unregistered transfer.*—It might have been otherwise had the defendants re-assigned the stock to B., on receiving payment from him, although no transfer had been made on the books of the company. *Id.*

9. *A resolution passed by the stockholders* does not bind the corporation. It can only act in the manner provided by its charter. (*Per* LOTT, Senator.) *McCullough* v. *Moss,* 440

10. *Personal liability of incoming stockholders.*—The act incorporating the Rossie Lead Mining Company, rendering the stockholders liable for its debts, is applicable to persons owning stock when the suit is brought, and not to those who were stockholders when the debt was contracted. (Per LOTT and VAN SCHOONHOVEN, Senators; BARLOW and TALCOTT, Senators, *contra.*) *Id.*

11. *Warranting value of stock at a future date.*—Where the vendor

STOCK. *Continued.*

warranted that the stock sold should be worth a certain sum upon a certain future date, he is not discharged by the fact that after the sale, but before the date fixed, the stock had reached the agreed figure. *Hawley* v. *Brumagim*, 464

12. *Identity of stock not changed by re-issue.*—The surrender of stocks by the assignee thereof for cancellation, and the taking of other certificates in his own name, does not change the identity of the stock. *Id.*

13. *The contract of the subscription.*—By the act of subscribing to the capital stock of an incorporated association, each associate undertakes to raise his proportion of the capital as it may be called for by the directors. *Merrimac M. Co.* v. *Levy*, 467

14. *Implied duty to pay.*—The law authorized the directors to call in the subscription; this ordinarily implies a corresponding duty to pay. *Id.*

15. *Personal liability.*—The articles of association under the law, contemplated a substantial capital for defined purposes; this was both to carry out the object of the corporation and for the protection of creditors, and therefore created a personal liability for the subscriptions. *Id.*

16. *Status of assignee of stock.*—A purchaser from an original subscriber is substituted to his obligations as well as his rights, and, being accepted by the corporation, a privity is established between them. *Id.*

17. *No implied promise.*—No implication of a personal promise of the transferee to pay assessments arises. *Franks Oil Co.* v. *McCleary*, 477

18. *Company to follow the stock.*—The company can indemnify themselves only by a sale of the stock and pursuit of the original subscriber. *Id.*

19. *From the voluntary payment* of one assessment by the transferee, a promise to pay others can not be inferred. *Id.*

20. *Shares of stock are alike*, and a transfer thereof procured to be made by another would be a compliance with a contract to deliver. *Wynkoop* v. *Seal*, 493

21. *Transfer of stock not registered.*—A transfer of stock which has not been entered on the books of the company, as required by statute, is nevertheless valid for the purpose of enabling the assignee to maintain an action against fraudulent trustees who are wasting the corporate property and converting it to their own use. *Parrott* v. *Byers*, 506

22. *Ratification of a sale made by a pledgee.*—If a sale of mining stock, pledged as security for money, is made without notifying the pledgor to make his margin good, and without sufficient notice of time and place, still, if the pledgor knew of the time and place of sale, and made no objection, and after the sale approved of it, and promised to pay a balance claimed by the pledgee, he by these acts ratifies the sale. *Child* v. *Hugg*, 512

23. *Identity of shares—Sale of stocks by bailee.*—Where a bailee of mining stock is at all times able, ready and willing to transfer to the bailor the same number of shares of similar stock, of the same company, and of the same value, the sale or conversion of the identical shares pledged only constitutes a technical breach of trust, and presents a case of *damnum absque injuria*. *Atkins* v. *Gamble*, 514

STOCK. *Continued.*

24. *Exception to the rule where stock is concerned.*—Shares of stock in a corporation stand upon a different footing from other personal property, as regards the right to the recovery of the specific property, because they are mere evidences of interest in the business of the corporation, and, if all the shares are of equal value, there can be no reason for preferring one share to another. *Id.*

25. *Note of stockholder for stock.*—By the act of July 18, 1863, (manufacturing companies) a note given after the organization of the company for additional stock is valid, notwithstanding the provision in the act that "no note given by a stockholder shall be payment of any part of the capital stock." *Hager* v. *National Oil Co.*, 538

26. *Right of subscriber to demand stock.*—Hacker subscribed for additional stock in a corporation and she gave her note for the amount; a certificate was tendered her and refused and no credit was given her in the stock ledger: *Held*, the note was not without consideration; she had the right to demand and receive the stock. *Id.*

27. *Unregistered transfers of stock* under the laws of California, except between the contracting parties, do not pass the title. *Bercich* v. *Marye*, 544

28. *Certificates of stock in a corporation are not negotiable securities* in a commercial sense, but are mere muniments and evidences of the holder's title to a given share in the property and franchises of the corporation of which he is a member. *Sherwood* v. *Meadow Valley Co.*, 547

29. *Insolvent corporation buying its own stock.*—An insolvent corporation can not purchase a portion of its capital stock. Such a transaction would be in conflict with Gen. Stat. Ch. 135, Sec. 3. A corporation whose capital stock as fixed and limited has not been fully paid in, can not relieve a delinquent stockholder from payment of assessments upon his stock by a purchase of the same, especially against the objection of another stockholder. *Currier* v. *Lebanon Slate Co.*, 559

30. *Power in equity to compel issue of stock.*—Where the board of directors of a corporation, in issuing new stock to the stockholders generally, refuse to issue to a particular stockholder his due proportion of such new stock, he may compel its issue to him by suit in equity against the corporation, there being sufficient of such stock undisposed of, notwithstanding his remedy at law for damages. *Dousman* v. *Wisconsin & Lake S. Co.*, 572

31. *Suits to compel issue of stock must be several.*—Suits by stockholders to compel the issue of stock to them, their interests being several, can not be prosecuted in the name of one on behalf of himself and others. *Id.*

32. *A person who has not the legal title* to the stock of a corporation can not maintain an action against the company for converting it. *Morrison* v. *Gold Mt. M. Co.*, 579

33. *Conversion of shares of stock by corporation.*—An order of the president of a corporation drawn upon himself as president to transfer to a person a certain number of shares of stock of the corporation, followed by the refusal of himself and the secretary to deliver the stock, does not amount to a conversion of the stock by the corporation. *Id.*

STOCK. *Continued.*

34. *Transfer of stock of corporation, before organization.*—If the owners of a mining claim agree to incorporate and take stock in the corporation in proportion to the interest of each in the mine, and before the corporation has been created, one transfers to a third person shares of stock to be issued as soon as the corporation is in existence, and gives him a certificate to that effect, the corporation is not bound by the transfer or certificate, and is not obliged to issue the stock to such third person. *Hawkins* v. *Mansfield M. Co.*, 581

35. *Title to stolen stock* can not be divested out of the real owner by sale at auction and purchase by innocent buyer. *Pratt* v. *Taunton Copper Co.*, 590

36. *Unauthorized reissue of stock.—No remedy against innocent holder.*—Shares of stock were taken without the owner's knowledge and with a forged power of attorney delivered to auctioneers for sale. The auctioneers procured new certificates from the company and, in turn, their vendee procured new certificates: *Held*, in a suit by the owner against the corporation *and* purchaser, that the owner was entitled to a new certificate from the corporation and to the dividends, but not to a decree against the purchaser, and that the contention between the corporation and the purchaser must be settled in a suit between themselves. *Id.*

37. *Discoverers incorporate—Error in issue of stock—Stock not void.*—Where the locators of a mining claim and their assigns consolidated their interests, and conveyed to the trustees of a corporation, which corporation was to issue stock to the parties who thus conveyed in proportion to the number of feet each had conveyed, and an error was made in the distribution of shares, the discoverer not being allowed for his additional claim, so that the others received more and the discoverers received less than their respective claims in feet entitled them to: *Held*, that the corporation was bound to purchase shares and transfer them to the discoverer, or pay him their value, or issue new shares to him, unless the full quota had been issued: *Held, further*, that the shares wrongfully issued to the other parties in excess of their proportion were not invalid. *Smith* v. *North Am. M. Co.*, 599

38. *Limit of stock issue.*—A court can not order stock issued where the limit of issue has already been reached. *Id.*

39. *Liability of assignor of unpaid stock—Demand necessary.*—Under the Constitution of Oregon the stockholders of all corporations and joint stock companies are liable for the corporate indebtedness to the amount of their stock subscribed and unpaid, and no more; and by statute "All sales of stock subject the purchaser to the payment of any unpaid balance due or to become due on such stock; but if the sale be voluntary the seller is still liable to existing creditors for the amount of such balance unless the same be duly paid by such purchaser." Under these provisions it is not sufficient to constitute a cause of action against a stockholder who has made a voluntary sale of his stock, to aver that there is an unpaid balance due or to become due upon said stock; but it should be further averred that such balance, after demand by the properly authorized officers of the corporation, remains unpaid. *Ladd* v. *Cartwright*, 607

STOCK. *Continued.*

40. *Evidence of value of stock.*—The question being upon the value of certain mining stock at the time of its sale, the court properly excluded evidence going to the possible prospective value of the mines, *e. g.*, what it would cost to treat the ore if a stamp mill were put up at the mine. *Fitz* v. *Bynum*, 612

41. *Liability of shareholders—Assessments of stock.*—A mining corporation organized under the statutes of California, issued to the former owners of the mining property a certain proportion of the stock and the balance was reserved as working capital. *Held*, that the stockholders incurred no liability, *ex contractu*, either express or implied, to pay in, either for the prosecution of the enterprise or the payments of the debts of the company, the nominal par value of their shares. *Held further*, that unless the stockholders subscribed for stock, or are the successors of subscribers, assessments levied on them can only be enforced by the sale of their shares. *South Mt. M. Co., In re* 615

42. *Stockholder attacking judgment against corporation.*—Under the act of 1872, making stockholders liable for unpaid stock to creditors of the corporation, a stockholder when sought to be made liable can not attack the judgment recovered against the corporation on the ground that it is collusive and unjust. If he can attack the judgment on that ground, he must do so in a court of chancery. *Coalfield Co.* v *Peck*, 623

See BAILMENT 1, 2; BROKER; CORPORATIONS; FORFEITURE, 1; GUARANTY 1, 2; INNOCENT PURCHASER, 1–4; MEASURE OF DAMAGES, 1–3; PERSONAL LIABILITY; RESCISSION, 2, 4; SHARE; SPECIFIC PERFORMANCE, 15–17; STATUTE OF FRAUDS, 8–10; TENDER, 1, 2.

STONE—See RESERVATION, 7.

SUNDAY.

1. *Notice of rescission on Sunday.*—An objection that a notice of rescission was void because given on Sunday is without force, unless the result is effected by statutory provision, and the Nevada statute does not have that effect. *Pence* v. *Langdon*, 32

SURFACE.

1. *Storing ore.*—Ordinarily, the mine owner can not justify the use of the surface for the lengthened keeping of his ore, the long continued deposit of the rubbish from the mine, or the erection of buildings for the storage of materials, the housing of animals or the use of artisans. *Marvin* v. *Brewster Iron Co.*, 40

2. *Relation between lode and surface ground.*—The surface ground and the lode are not independent grants. It is not the purpose of the act to grant surface ground without a discovered lode. The lode is the principal thing, and the surface ground incident thereto. *Wolfley* v. *Lebanon Co.*, 282

3. *Mineral owner bound to ware his pits against surface owner's cattle.*—A person entitled to the minerals under the land of another, with license to make a mine-shaft opening into it, is, in the absence of any stipulation to the contrary, under a legal obligation to the owner of the surface soil to fence the shaft, so as to prevent its being a source of danger to his

SURFACE. *Continued.*

cattle which may be upon it; and is liable to an action for injury accruing to those cattle for want of such fencing. *Williams* v. *Groucott*, 632

4. *Relative rights of the several owners of surface and minerals.*—When the surface and the minerals belong to separate owners, the owner of the surface is *prima facie* entitled to the support of the subjacent strata, and the owner of the minerals is bound so to work the mines as to leave sufficient support for the surface; but these rights may be varied by express stipulation. *Smart* v. *Morton*, 655

5. *Sic utere tuo.*—The upper and underground estates are governed as other estates, by the maxim, *sic utere tuo ut alienum non lædas.* *Jones* v. *Wagner*, 690

See RESERVATION, 2, 3, 7, 19; SEVERANCE; SPECIFIC PERFORMANCE, 3.

SURFACE SUPPORT.

1. *Support of soil and building.*—All that can be claimed by the owner of the surface, under the right of subjacent support, is that no physical injury be wrought to the surface in its natural state, or as contemplated at the time of the grant. The mine owner is not bound to support buildings subsequently erected. *Marvin* v. *Brewster Iron Co.*, 40

2. *Building on undermined lot, has no claim to support from adjoiners.*—If a party builds a house on his own land, which has previously been excavated to its extremity for mining purposes, he does not acquire a right to support for the house from the adjoining land of another—at least until twenty years have elapsed since the house first stood on excavated land and was in part supported by the adjoining land, so that a grant by the owner of the adjoining land, of such right to support, may be inferred. *Partridge* v. *Scott*, 640

3. *Idem—No grant presumed against party both ignorant and innocent.*—Rights of this sort can have their origin only in grant, and, *semble*, such grant ought not to be inferred until after the lapse of twenty years since the owner of the adjoining land knew or had the means of knowing that the land had been so excavated. *Id.*

4. *Adjoiner not liable for subsidence.*—The owner of the adjoining land is not liable to an action on the case, if, within such period, he works mines under his own land so near its boundary as to cause the excavated land on which the house stands to sink, and the house to be thereby injured. *Id.*

5. *Injury to building by undermining—Essential averments.*—A declaration in case by reversioners stated that certain buildings and closes were in the occupation of A and B, as tenants of the plaintiffs, the reversion belonging to them. That the defendant so negligently and without leaving proper support worked certain mines near and contiguous to the premises, and dug minerals out of the mines near and contiguous to the said buildings and closes, whereby large portions of the buildings became injured and the ground on which the buildings stood and the said closes swagged and gave way: *Held*, that the declaration was good; that as it did not appear that the soil in which the mines were belonged to the defendant, or that the defendant had all the right to get the mines

SURFACE SUPPORT. *Continued.*

that the owner of the adjoining soil had, the defendant was *prima facie* a wrongdoer and that it was unnecessary to aver that the plaintiffs had a right to have the buildings supported by the soil under which the defendant worked. *Jefferies* v. *Williams*, 645

6. *Distinction between "near" and "contiguous"* lands, stated. *Id.*

7. *Special plea required.*—A right to get minerals so as to leave the soil or the buildings above it without support must be specially pleaded. *Id.*

8. *Construction as to surface support—Coal mining.*—Where the deed which granted the surface, reserving the minerals, contained only the provision that the grantor should have the collieries and coal mines, veins and seams of coal, together with free and full power and liberty at all times to work, sink, dig for, or win the same, and to drive drift or drifts, make watercourses, or do any other act necessary, needful or convenient for the working, winning, obtaining or getting the same, paying to the grantee treble damages for loss or damage sustained by reason of the working of the mines: *Held*, 1, that the terms of this reservation did not authorize the grantor to work the mines in such manner as to leave the surface without support; 2, that the entire removal of all the coal, so as to deprive the surface of support, was not an act necessary for the working and winning of the mines; 3, that upon the evidence, it was contrary to the approved practice of mining in the county of Durham at the date of the reservation to leave the surface without support. *Smart* v. *Morton*, 655

9. *Right implied in lease.*—There is a *prima facie* inference at common law upon every demise of minerals or other subjacent strata, where the surface is retained by the lessor, that the lessor is demising them in such a manner as is consistent with the retention by himself of his own right to support. In the absence of express words showing clearly that he has waived or qualified his right, the presumption is that what he retains is to be enjoyed by him *modo et forma*, and with the natural support which it possessed before the demise. *Dugdale* v. *Robertson*, 662

10. *Mines must leave support to buildings.*—Where the ownership of the soil was invested in one and the ownership of the mines in another under an Inclosure Act prohibiting the working of the mines within forty perpendicular yards of the foundations of buildings, it was *held* that the prohibition to work within that distance was absolute, but that the miner was liable under common law rules for damage done by mining beyond that distance. *Haines* v. *Roberts*, 668

11. *Old and new excavations.*—The plaintiff was the owner of a house erected in 1834, on solid ground. Previously to the building of the house a portion of the minerals had been gotten under a garden which adjoined the house. In 1838 a portion of the minerals was gotten under the defendant's land which adjoined the garden. In 1865 the defendant commenced getting out the rest of the minerals under his land. In 1857 the plaintiff's land sank, and the house was injured by the defendant's mining operations. It was found by the jury that the sinking of the plaintiff's land was caused by the defendant's workings; that some damage would have happened, but not to the same extent, if the garden ground had

SURFACE SUPPORT. *Continued.*

been left solid; that the defendant knew of the excavations under the garden; that the land would have sunk in just the same whether there was a house on it or not; and, lastly, that the damage to the plaintiff's house by the sinking was £300; £250 occasioned solely by the defendant's workings and £50 damages caused in part by the excavation under the garden: *Held*, (1) That inasmuch as the sinking of the plaintiff's land was in no way caused by the weight of the house, the plaintiff was entitled to recover whether he had acquired a right to support for his foundations by the defendant's soil or not. (2) That although the excavation under the garden contributed to the extent of £50 to cause the damage, the plaintiff was entitled to the whole £300, because if the defendant had not done the wrongful act complained of, no part of the damage would have occurred. *Brown* v. *Robins*, 669

12. *Custom of leaving pillars for the time being* and of returning to remove them after the land has been allowed to slowly settle—in the statement of the case. *Id.*

13. *Exception of minerals—With power to get them regardless of support.*—The conveyances of an estate in a mining district, sold in lots, contained an exception of all mines and minerals under the land included in the lot conveyed with full power to the grantor to work, get, and dispose of them, without entering upon the land sold, but without being answerable for any injury to the land, or any buildings on it, by reason of working or getting the excepted minerals, and without being liable to any action or suit for any such injury: *Held*, that a purchaser of a lot was not entitled against the grantor to either vertical or lateral support for the surface of his land. *Williams* v. *Bagnall*, 686

14. *Mines servient to support.*—The mining property is servient to the surface to the extent of sufficient supports to sustain it, and on default the owners and workers are liable for damages. *Jones* v. *Wagner*, 690

15. *Usage to the contrary.*—To control the rule of the common law, a usage to mine without observing this duty, must be so ancient and uniform in the particular region as to amount to a custom. Such custom must be so ancient that the memory of man runneth not to the contrary. *Id.*

16. *Power, under lease, to win without leaving pillars.*—Defendants were sued for mining under plaintiff's land without leaving proper supports, whereby plaintiff's buildings were undermined and fell. Plea, a lease from the plaintiff's grantor, prior to plaintiff's purchase, demising the minerals for thirty-eight years, with full power to get the minerals, and with special covenants as to compensation for damages done to buildings erected or to be erected, or to crops, with the option of repairing such buildings, etc. Conclusion, that defendants were assignees of such lease, and were always ready to perform the covenant. On demurrer, it was *held*, that the plea was good; for that the terms of the lease were sufficient to show by implication that it was intended that the lessees of the mine should have the right to work the mine so as to undermine the surface—subject to paying damages according to the covenants. *Smith* v. *Darby*, 695

SURFACE SUPPORT. *Continued.*

17. *Right of support yielded by grant.*—The right of support to the surface may be divested by grant to the party working the minerals, and the subsequent purchaser of the surface will take subject to such grant. *Id.*

See INSPECTION 1; RES ADJUDICATA, 1; SEVERANCE.

TENANT IN COMMON.

1. *Transfer of single share among common owners.*—The withdrawal of one member from all participation in the affairs of a mining company, another taking his place and representing the interest, is a change of possession as to that interest. *Patterson* v. *Keystone Co.*, 171

2. *Equity jurisdiction on bill by co-tenant of mine against surface owner, etc.*—A bill in equity brought by one claiming an estate in three undivided fourths of the mines in a certain tract of land, with the right to pass and repass, to dig for and carry away the ores, against the owner in fee of the whole of the soil of said tract, for digging and carrying away ore, and wasting and destroying the same, and forcibly resisting and disturbing the plaintiff in the exercise of his rights, is not within the equity jurisdiction of this court, either on the ground of a nuisance by a disturbance of the use of a right of way, or as showing the parties to be tenants in common of the mines. *Adam* v. *Briggs Iron Co.*, 225

See POSSESSION, 2; SEVERANCE, 4.

TENDER.

1. *Breach of stock contract—Tender, when not necessary.*—Where a contract is made for the delivery of certain shares of mining stock at a future day, it is not necessary for the purchaser to make an actual offer or tender of the money at the time and place, in order to sustain an action for breach. If the demand be properly and sufficiently made, and the purchaser be prepared to pay at the time and place, this is sufficient. *Wheeler* v. *Garcia*, 481

2. *Offer to return, necessary before contesting note given for stock.*—In an action upon a note given for stock, the defense was that defendant was induced to execute the note by false and fraudulent representations that the value of the stock was great, whereas it was worthless. The court instructed the jury that if the stock had any value, the defendant must have offered to return it, or the plaintiff would be entitled to a verdict. The evidence was conflicting as to value, and the jury brought in a verdict for defendant: *Held*, that the instruction was correct, and the verdict conclusive. *Fitz* v. *Bynum*, 612

See RESCISSION, 4, 9.

TIMBER.

1. *Timber and minerals, allied.*—The law of timber and of minerals is, in principle, the same. *Buckley* v. *Howell*, 245

See WASTE, 1.

TIME.

1. *Time of the essence of mining contracts.*—In contracts for the lease of working mines, time, though not named, is, from the fluctuating nature of the property, considered as of the essence of the contract, and the intended lessee may therefore fix a reasonable time for completion, and on the lessor's default, may rescind the contract. *Macbryde* v. Weeks, 346

TRESPASS.

1. *Title in trespass quare clausum.*—If plaintiff can not show actual and exclusive possession of the land, but is obliged to rely upon his legal title, he must show a *valid* title. *Stephenson* v. *Wilson*, 408

2. *Idem—Tax title claimant, not an intruder.*—In trespass *quare clausum fregit*, when defendant claims title under a tax deed, although if plaintiff were the holder of the original government title, defendant's right of action against him on the tax deed would be barred by reason of plaintiff's occupancy during parcel of the three years next after recording the deed, still, as to the acts performed by him, having claim of title and right of possession under his tax deed, defendant can not be treated as a mere wrongdoer or intruder, but he may question the sufficiency of plaintiff's title, and require him to make strict proof of it. *Id.*

TRIAL.

1. *Doubtful questions should not be taken from jury.*—An exception to the refusal of the court to direct the jury to find a verdict in favor of the defendant, will not be sustained, if there is any room for doubt that it was the duty of the jury so to find. *Pence* v. *Langdon*, 32

TROVER—See CONVERSION.

TRUST.

1. *Purchaser with notice of trust.*—A purchaser of real estate, with notice that his grantor holds the title as trustee, stands in the place of the grantor, and is chargeable with the trust. *Stewart* v. *Chadwick*, 237

See CORPORATION, 8; DOWER, 1; PERSONAL LIABILITY, 12, 13; PLEADING AND PRACTICE, 5; SEVERANCE, 8.

ULTRA VIRES—See CORPORATION, 4.

VARIANCE.

1. *Judgment not following prayer.*—Where the complaint in a suit to compel the issuing of certain shares of new stock to plaintiff, alleged that the new issue of stock had been actually made to the shareholders generally, and prayed for a corresponding issue to the plaintiff, and the judgment, instead of following the prayer, restrains the corporation from issuing any more new stock unless it shall issue a proportionate amount to the plaintiff, such variance will not justify a reversal. *Dousman* v. *Wisconsin & Lake S. Co.*, 572

VENDOR AND PURCHASER.

1. *Purchaser with notice of settlement.*—An agreement having been made with the express intention of settling prior disputes, a party can not go behind it, and those taking under such party with notice of the contract take subject to it. *Stewart* v. *Chadwick*, 237

See SPECIFIC PERFORMANCE.

WAIVER—See DEPOSITIONS, 2; FRAUD, 2, 6.

WARRANTY—See STOCK, 11.

WASTE.

1. *Unlimited use, including timber.*—Devise of salt works, for life, remainder over, construed to allow the devisee to make unlimited use of the

WASTE. *Continued.*

salt works, saline water and the wood land supplying them with fuel. *Findlay* v. *Smith*, 182

2. *Circumstances of new country.*—The law of waste must be accommodated to the circumstances of a new and unsettled country. *Id.*

See SALINES, 1.

WITNESS.

1. *Competency of witness.*—One who conveys land by deed of general warranty is a competent witness for the complainant in a suit against the grantee, to show that by mistake the deed conveyed a greater interest than the grantor possessed. *Stewart* v. *Chadwick*, 237

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